



Professor Richard J. Grunawalt

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INTERNATIONAL LAW STUDIES

Volume 72

The Law of Military Operations

Liber Amicorum Professor Jack Grunawalt

Michael N. Schmitt

Editor



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Foreword

The International Law Studies “Blue Book” series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. This, the seventy-second volume of that series, is a collection of articles prepared by friends of Professor Richard J. “Jack” Grunawalt to mark the occasion of his retirement as the Director, Oceans Law and Policy Department of the Center for Naval Warfare Studies, Naval War College.

Jack Grunawalt came to the Naval War College in 1986 as the Charles H. Stockton Professor of International Law, and held that Chair until becoming the Director, Oceans Law and Policy Department in 1989. Under his leadership of its international law program, the Naval War College has regained its historic stature as the world’s preeminent military institution for the study and articulation of the rules of law governing the world’s oceans, both in time of peace and in time of war.

It is the renaissance of the “Blue Books” during Professor Grunawalt’s tenure that has contributed significantly to the restoration of the Naval War College’s stature in the study of international law. Indeed, this is the ninth volume in the series that has been published since 1990. Thus, it is most appropriate that Jack Grunawalt’s contributions to the Naval War College be recognized through the publication of a “Blue Book” in his honor. It is also a testament to the high regard in which he is held that so many notable contributors, both military and civilian, would prepare articles for this special edition, which is unique in the long history of the “Blue Book” series.

While the opinions expressed in this volume are those of the individual authors and not necessarily those of the United States Navy or the Naval War College, they make a valuable contribution to the study of the varied areas of international law that are addressed. On behalf of the Secretary of the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps, I extend to the contributing authors and the editor our gratitude and thanks. I would also like to thank Jack Grunawalt on behalf of the faculty and students of the Naval War College who have been privileged to be associated with him and to have learned from him.

JAMES R. STARK
Rear Admiral, U.S. Navy
President, Naval War College

Preface

Every so often someone comes along who makes a real difference—the kind of difference that, in the great scheme of things, matters. Professor Jack Grunawalt is one such individual, for it is no exaggeration to label him the father of operational law in the United States military. Indeed, before I came to the Naval War College, an Air Force colleague pulled me aside to “warn” me about Jack Grunawalt, the man who saw himself as the “keeper of the ROE” (rules of engagement). After three years of working for him, I am convinced he is not only the “keeper,” but that this is a good thing for our nation. Today, there are simply no military operations conducted by U.S. forces, or even those of other countries, that do not evidence the hand of Jack Grunawalt. Whether directly through application of the Standing Rules of Engagement he helped to craft or indirectly through the thousands of Grunawalt-trained judge advocates and operators around the world, his influence is omnipresent. This “keeper” has guarded and nurtured his charge well.

Moreover, he also authored what is clearly the lead law of military operations manual in the world, *The Commander’s Handbook on the Law of Naval Operations*, NWP-9 (now 1-14M). Copies of that masterpiece can be found from the bridges of Latin American warships and the ICRC Legal Adviser’s Office to the Yale Law School Library and the Combined Air Operations Center for Operation NORTHERN WATCH. I know of no other work in recent times that can pretend to make a comparable claim.

His greatest legacy, however, lies not in these accomplishments or those described in the introduction to this book. Rather, it lies in his influence on the individuals who will continue to shape operational law in the years to come. He is very much the Myres McDougal of this *corpus* of law, for the mark of Jack Grunawalt, like McDougal, is indelibly imprinted on all those who have had the good fortune to have worked with him or benefited from his selfless mentorship. Of course, the Grunawalt experience is not always pleasant; a crusty opinionated sea captain he remains—even in the ivory halls of academia. But it is always an experience from which one emerges bettered.

So as Jack Grunawalt prepares to head off to the adventure-filled retirement he justly deserves, those of us who have had the honor of working closely with him over the years deemed it appropriate to honor him with this *Liber Amicorum*, this book of friends. The topic was self-evident—the law of military operations—Jack’s law. Who the contributors should be was also obvious. Jack Grunawalt often talks of the Oceans Law and Policy (OLP) “family.” It includes present and former faculty members of the Naval War College, members of the

OLP advisory board, holders of the Stockton Chair of International Law at the College, and “special friends.” It is to the OLP family that we turned to produce this work.

Hopefully, the end product is a book that represents what Jack Grunawalt is all about. Consider the contributors, who range from vice admirals to lieutenant colonels; Army, Air Force, Navy, Marine, and Coast Guard officers; service academy and law school professors; a war college dean; CINC legal advisers; and a Joint Chiefs legal adviser. Indeed, the age gap between the youngest and oldest contributor is a half-century. It is a high tribute to Jack that his influence is felt across such a diverse group.

Then there are the topics. Contributors were given only the guidance (bearing in mind the book was a tribute to Jack Grunawalt) that they should write about operational law. Look carefully at the result. The subjects range from the law of war to the law of the sea; rules of engagement for “occupying” a Caribbean island to enforcing no-fly zones over Iraq; collective self-defense to covert action; the use of nuclear weapons to peace operations. Yet, the very diversity of topics reflects the diversity of operational law itself. It also represents the range of issues to which the Grunawalt influence has been brought to bear. Jack Grunawalt is no more or less at ease talking about maritime intercept operations than nuclear warfare . . . or theoretical international relations . . . or exploitation of resources in the exclusive economic zone. He is a man of extraordinary scope, and the only defining parameter of this book was that contributions somehow involve military operations.

Many have been involved in the creation of this expression of admiration for Professor Jack Grunawalt. The Naval War College Foundation provided a generous grant to support its publication. Captains Dan Brennock and Ralph Thomas of the Center for Naval Warfare Studies creatively ensured additional funding whenever needed. Captain Thomas also agreed to proof drafts during my absence on an extended hardship research trip to London, Bonn, and Geneva. Lieutenant Commander Sarah Supnick, USNR, selflessly volunteered her own time, and friendship, as associate editor for over two months during a critical period of production. Ms. Gina Vieira at the War College’s Publications Division generated draft after draft, always with an unfailing sense of humor. Lieutenant Colonel James Duncan of the Oceans Law and Policy Department took the book from proofs to publication with typical Marine determination. Special thanks is due to the Naval War College Press, particularly this volume’s editor, Ms. Pat Goodrich. Few can imagine Pat’s professionalism in managing a gaggle of type-A lawyers, oblivious to any rules of style or grammar, seemingly

concerned only with the travails of endnotes. Finally, a personal thanks to Lorraine and Danielle who, as always, suffered silently through my preoccupation with the task at hand.

On behalf of all Jack's friends, we wish him fair winds and following seas.

MICHAEL N. SCHMITT, Lieutenant Colonel, U.S. Air Force
Professor of Law
United States Air Force Academy

Sailor-Scholar

Ralph Thomas

I MUST BEGIN WITH A MODIFICATION of the standard disclaimer that each of us in government service is required to include with any publication: "The views expressed herein are my own and not necessarily those of Jack Grunawalt's friends, whose reflections on Jack I've been asked to represent." Though the memories of Jack that I relate are my own, they also attempt to synthesize all that he means to each of us. The only debate would be in the selection of adjectives that most aptly describe him. Should it be the "highest" or "greatest" respect? Should it be "enormous" or "extraordinary" accomplishments?

To capture the essence of the legend (a word used to describe him only when he is out of earshot) that is Jack Grunawalt seemed an impossibly presumptuous task for me. There are others who have known him longer, those he counts as his closest friends, and those to whom he turns for the wise counsel that has guided and assisted him in his careers as an active duty Navy judge advocate and then as a professor on the faculty of the Naval War College. I have had, however, the unique opportunity (and the greatest personal and professional privilege) of not only knowing Jack for many years but of having been closely associated with him for seven years here at the Naval War College. For five of those years I have served as the Deputy Director, Oceans Law and Policy Department, but whenever I am asked what my position is, I normally answer, "Jack Grunawalt's deputy." The former (and formal) title often generates quizzical expressions, while the latter prompts immediate recognition.

I have deliberately not included specific references to those who have worked with Jack over the years and whose friendship and advice he values so highly. Among them are individuals who have measureably contributed to the

development of operational law as it is practiced today in the armed services, as well as many who have assisted Jack in his efforts to restore the tradition of excellence in the study of law at the Naval War College. Were I to do so, I would almost certainly omit many deserving of mention—something I would not want to do. Each of you knows who you are. I would also like to apologize in advance to Jack, who, while he can never be described as retiring, has always been uncomfortable with introductions that describe his many accomplishments. His typical response is often a deflecting “I wish my mother had heard that.” Well, Mrs. Grunawalt you should hear what your son has accomplished.

Today, many people know Jack primarily for his accomplishments as the Stockton Professor of International Law and the Director, Oceans Law and Policy Department at the Naval War College. In fact, he has been at the War College long enough for me to have learned to refer to him as “Professor” Grunawalt—after all those years when he was “Captain” Grunawalt, Judge Advocate General’s Corps, United States Navy. Indeed, it was as Commander and then as Captain Grunawalt that he began to exert the influence that eventually rendered him the honorary title of “the father of operational law” as we know it today. While he was not the first Navy judge advocate we would refer to as an “operational lawyer,” he is acknowledged as the officer who firmly established judge advocates as key advisers to operational commanders on all aspects of their mission. It is he who led the effort to integrate lawyers onto the battle staff and into the command center and to acquire the security clearances necessary for their participation in the decision-making process. Navy judge advocates now accept those as “givens”—not so long ago they were not. That today they are, we owe largely to Captain Grunawalt.

In the process of becoming what I consider to be the finest operational lawyer the Navy JAG Corps ever raised, Jack Grunawalt served under a generation of Navy leaders that are themselves legends—Admiral Thomas Hayward, Admiral James Holloway, Admiral James Watkins, Admiral William Crowe, and Admiral Robert Long. His assignments, which included Special Counsel to the Chief of Naval Operations and Staff Judge Advocate to the Commander in Chief, United States Pacific Command, reflect the high regard in which he is held.

Following service in Vietnam as the Deputy Director, U.S. Naval Law Center, Da Nang, then-Commander Grunawalt was presented with his first opportunity to be heavily involved in the practice of operational law when he was assigned as the Staff Judge Advocate to the Commander, Seventh Fleet, the command responsible for directing the Navy’s efforts during the Vietnam

War. There Jack had the opportunity to see the results of flawed rules of engagement. I've never heard him say so, but I suspect his career-long (both careers) drive to ensure that rules of engagement never again produced such results began with that assignment.

But had that not been the motivation, clearly his service as the Counsel for the Long Commission that investigated the tragic bombing on 16 October 1983 of the Marine Battalion Landing Team (BLT) Headquarters in Beirut, Lebanon, focused his attention on the critical role of rules of engagement. Specifically selected to be the Counsel by Admiral Long, who headed the Commission, Jack learned of the now infamous Blue Card/White Card Rules of Engagement (ROE) that the Marines used in carrying out their security responsibilities. The robust Blue Card ROE set forth the rules for guarding the relocated U.S. Embassy following its destruction by a car bomb in April 1983. Much more restrained were the “peacekeeping” White Card ROE in effect at Beirut International Airport where the Marines were headquartered. It was the latter that substantially reduced the ability of the Marines on perimeter security to stop the explosive-laden truck that destroyed the BLT Headquarters. In one moment, 241 American military personnel, mostly Marines, died. I believe Jack's experience on the Long Commission resulted in a personal crusade (a word I've never heard him use) to do whatever he could to ensure that no more American military personnel would never die because of a failure of rules of engagement.

Captain Grunawalt capped his active duty service by authoring *The Commander's Handbook on the Law of Naval Operations*, or as it is better known, NWP 9. Regarded as the finest military manual of its kind in the world, it provides legal guidance to operational commanders on the many complex situations they confront, both in peacetime and during conflict.

NWP 9 evidences one of the consistent themes that have characterized Jack Grunawalt's service—an appreciation of the difficult role of the line officer, who sails the Navy's ships and flies her aircraft. (Many times I've heard him say during a rules of engagement presentation to a group of commanding officers, “Rules of engagement can be hard, just like everything else you do.”) With that in mind, Jack wrote NWP 9 not for lawyers, *but for operators*, recognizing that they make the decisions on how to operate and fight their ships and aircraft. Therefore, and as Jack often notes, there are no footnotes, case citations, nor Latin phrases in *The Commander's Handbook* (now in its third iteration, it is today known as NWP 1–14M).

Given his practical approach to the law, it should come as little surprise that when asked to define the phrase “operational law,” a new phrase coined to

describe the practice within the Department of Defense of what had previously been referred to as international law, Professor Grunawalt stated quite simply that it “is whatever it is that assists the commander in accomplishing the mission. Perhaps it’s providing advice on a difficult law of the sea or law of armed conflict question, or assisting with the development of rules of engagement for a sensitive operation, or perhaps it’s assisting in the convening of a court-martial, or drafting a will or power of attorney.” These few words capture the essence of Jack Grunawalt—it’s the lawyer’s role to do whatever it takes to help the operational commander—but Jack always adds an important caveat. While the lawyer’s role is to be proactive and creative in assisting the commander to accomplish a desired result, it is the lawyer’s responsibility to ensure that the result and the manner in which it is accomplished are consistent with the rule of law. As Jack has observed so frequently, the values of the United States as a nation and the personal values of American military professionals are reflected in the law, and no action must ever be taken which compromises those values. It was to this principle—the conduct of military operations within the rule of law—to which he dedicated himself most fully upon his move to the Naval War College following retirement from the Navy.

The study and teaching of law had been an integral part of the Naval War College program for decades. Indeed, it is reflected in Admiral Stephen B. Luce’s first Order, dated 2 September 1885, to the first Naval War College class: “Lectures will begin on September 7. The working days will be Monday, Tuesday, Wednesday, Thursday, and Friday. The lectures on International Law will be delivered daily at 10 am. . . .” The first civilian professor joined the War College faculty over 110 years ago, when James R. Soley was appointed to teach international law. That professorship, which became the Stockton Chair in 1967, has been held by some of the most eminent international legal scholars in the world. They include John Bassett Moore, later a judge of the Permanent Court of International Justice; Professor Manley O. Hudson, who went on to become a judge on the International Court of Justice; Berkeley Professor Hans Kelsen; and Newport’s own, Professor Howard Levie.

In 1986, now retired Captain Jack Grunawalt was appointed to the Chair. The first chairholder in the history of the Stockton Chair to move directly from a military career into the College’s oldest and most prestigious chair, he held it for an unprecedented three years. Then in 1989, he proposed the creation of an Oceans Law and Policy Department within the Center for Naval Warfare Studies.

As Dr. Bob Wood, then and now the Dean of the Center for Naval Warfare, observed, “When [Jack] first came into my office to propose an Oceans Law and Policy Department, it was evident he spoke with considerable authority.

His vision entailed it as no less than a center of excellence which would become the authority on operational law—a repository of current practice, a place of original scholarship, and the teacher not only of U.S. Armed Forces, but of the forces of friendly States as well. He envisioned that the Oceans Law and Policy Department would draw the parameters of operational law into the 21st century.” Dr. Wood continued, “An ancient proverb proclaimed that young men would dream dreams and old men would have visions. I concluded either that Jack was subject to psychedelic hallucinations or that he was a dreamer and visionary of tremendous power. Happily for the nation,—and for me—he was certainly the latter.”

Jack was appointed the first director of the newly formed department, a position he occupied until his retirement in the summer of 1998. In the years preceding Jack’s arrival, the War College had witnessed a decline in the emphasis placed on international law. But the dedicated visionary that spoke to Dr. Wood of his dream of a center of excellence oversaw the restoration of the College’s reputation as the world’s pre-eminent institution for the study and teaching of the law of naval operations, both in peacetime and during conflict.

In his contribution to this volume, Admiral James H. Doyle describes the truly remarkable “Grunawalt era” at the Naval War College, and speaks of Professor Grunawalt’s many accomplishments. I will defer to Admiral Doyle and refrain from repeating them here; rest assured, however, that they can be described as enormous, indeed, extraordinary. Among them was his revitalization of a program that had in great part established the College’s position on the international legal scene—the publication of the “International Law Studies” series, recognized throughout the world for its contribution to the understanding of international law. Through Jack’s diligence and dedication, the series is now as productive and useful as it has ever been in its nearly 100-year history. Therefore, on the occasion of his retirement from the Naval War College, Jack’s closest friends, colleagues, and mentors have collaborated to honor him with this “Blue Book”—Jack’s “Blue Book” if you will. We could think of no more fitting tribute to this sailor-scholar. On behalf of all those whose lives have been touched, either professionally or personally, by the legend that is Jack Grunawalt, we humbly ask that he accept this token of our respect and admiration.

So, Mrs. Grunawalt, if you are proud of all your son has accomplished . . . you should be. He has served his Navy and his country with unparalleled devotion during times of both peace and war. Along the way, he selflessly shared his knowledge and vision with us. It is our honor to have had that great opportunity.

I

Secrets in Plain View: Covert Action the U.S. Way

M.E. Bowman

WE AMERICANS HAVE A UNIQUE CULTURE. We champion openness in government but implement many policies in secret. Historically, we have been quick to fight for national honor but equally quick to publicly and mercilessly criticize ourselves; a future historian might even conclude that we defined our culture by airing dirty laundry. From the very beginning, we publicly debated our national morality—from slavery to the Indian campaigns; from Mexico to the *Maine*; from Vietnam to Panama. We even exposed “secret” executive actions by televising the introspective and painful investigations of such notable events as Iran-Contra and the Church Committee hearings. Probably more than any other nation in the world, we can expect that sooner or later virtually any executive activity of the United States will be publicly scrutinized.

Executive Action

Lacking precise definition, executive action has become a term of art that describes activities designed to influence behavior. Executive action often is “secret,” but not always. If secret, it often is coercive. When practiced by the United States, it is always a tool of foreign, never domestic, policy.

Executive action may be applied directly—by military or paramilitary force, economic leverage, or political activities—or it may consist of mere persuasion. Executive action may also be applied indirectly, for example by using surrogates, propaganda, or even covert military, economic, and political activities. Each of these techniques will be a focus, from time to time, for covert action.¹

Covert action practiced by the United States shares its cultural heritage with intelligence. A scant few decades ago, nations would tacitly concede, but rarely admit, the common practice of international intelligence gathering—of spying on other nations. The United States was no exception.

Prior to World War II, the United States was, perhaps, the least experienced spy master of the developed nations.² U.S. intelligence activities had been a desultory lot, sometimes favored, sometimes vilified, rarely admitted and always in jeopardy of extinction. Yet, at the end of World War II, we not only planned to continue into peacetime the intelligence institutions conceived in war, we also codified and published the intent. More recently, we undertook a similar catharsis with covert action.

American Candor

The National Security Act of 1947 was a mold for much of contemporary U.S. Government intelligence practice. A legislative behemoth originally devoted to overhauling the military establishment, the draft Act was seized upon as a handy tool by which to create the National Security Council, a Director of Central Intelligence, and the Central Intelligence Agency. Each is an institution important enough, and certainly visible enough, to obscure what may be the most significant aspect of the Act. By this peacetime legislation, the United States officially and publicly recognized intelligence gathering as a legitimate foreign policy process.³

The Act was eloquent testimony to the belated acceptance by the United States of international intelligence gathering that included even reading other people's mail.⁴ Perhaps even more significant, however, was the world reaction—or lack thereof. Global ennui eloquently testified to international acceptance of intelligence activities.⁵

The 1947 Act did more, however. Just as the Act acknowledged a purpose to gather intelligence internationally, it also acknowledged—albeit obliquely—an acceptance of the necessity to engage in covert action. In understatement worthy of our British heritage, the Act required that the

Central Intelligence Agency perform such other functions as the National Security Council might direct.⁶

The meaning of that language in the 1947 Act might have been less than obvious at its creation, but four decades later it was clarified. By that point in history, it was probably unnecessary to clarify the fact that the U.S. engages in international covert action, but the clarification was, nevertheless, instructive. In 1991, in an era when the sovereignty of developing nations was at its emotional apex, the Congress of the United States once again did something that only a secure democracy could dare. Not unlike its 1947 legislative admission, Congress publicly confirmed its policy of peacetime covert action by amending the U.S. Code to more explicitly acknowledge covert action as U.S. policy.⁷

Congress statutorily confirmed an acceptance of covert influence on the affairs of other nations. This easily was our most profound statement on U.S. willingness to mold other nations to our liking. It was also unusual candor in an era when proliferation of new nation-States elevated sovereign emotions to new heights.⁸ Nevertheless, as with the 1947 legislation, not a ripple disturbed the surface of the nation-state system.

U.S. Covert Action

Because covert action amounts to interference with sovereign rights, nations always seek to distance themselves from the activity.⁹ The reason is axiomatic—covert actions inherently, and universally, are fractious political issues that flaunt a universal need for rules of international behavior. Nevertheless, from time to time, all nations find it necessary to cloak official processes from public view; certainly, that was never more true than during the era of the Cold War.¹⁰ Adversaries and ideology aside, the Cold War interest in avoiding nuclear conflict promoted a relatively high tolerance for covert action as well as understood “rules” for the genre. “Plausible deniability” was a key goal; indeed, in that bipolar world it became rule number one.¹¹

Our limited experience with modern covert action originates primarily in World War II.¹² Ours is a culture that easily tolerates covert actions as a daring-do adjunct to armed combat, but to surreptitiously influence (or change) other governments in peacetime is far more difficult for us to countenance. Not unlike our history of intelligence gathering, covert action has no luster in the United States—we simply don’t like secrecy. We like to consider ourselves as ingenuous, open, and honest. We prefer to regard deviousness and secrecy as the product of evil empires. More importantly, we

believe strongly in a government of shared political power. Covert action, which definitionally restricts participatory activity, seems somehow antithetical to these ideals.

Despite this cultural inhibition, covert action was “writ large” in the political environment of the post-War period. The fall of Nazism and the rise of communism ushered in an era of political tension, paranoia, economic distress—and nuclear terror. Covert actions seemed to be ideally suited to accomplish foreign policy goals without unacceptable risk of rekindling military conflict. Prodded by Cold War fears, the number of covert actions multiplied.

Communist insurgencies and communist-inspired political subversion had become ubiquitous reality during the tedious process of rebuilding, or building anew, from a war-ravaged world. Polarized political views, coupled with a tenuous peace, made traditional foreign policy slow and cumbersome in a fast-developing world. By contrast, covert action beckoned policy makers with a promise of swift, high-impact alternatives ideally suited for post-war containment policy. The result, observed Henry Kissinger, is that all Presidents since World War II “have felt a need for covert operations in the gray area between formal diplomacy and military intervention.”¹³

Shielding the United States as well as the President from public scrutiny,¹⁴ even marginal success served to breed new covert actions. Knowledge of covert operations became so commonplace that the United States was accused of being responsible for nearly all internal difficulties worldwide.¹⁵ Not surprisingly, the American political consensus of the war years that had insulated intelligence and covert action from close scrutiny did not survive the advent of peace.

Close scrutiny did not occur overnight, but when it started, it became an irresistible force. Covert actions begun under the OSS continued through the both formative and mature years of the CIA. Then, more plebeian domestic concerns related to U.S. intelligence activities focused legislative attention on covert activities as well. Our proclivity for participatory democracy prevailed; all “secret” foreign policy came up for debate, and covert action was no exception. Under the sharp scrutiny of Senator Frank Church, the intelligence community suffered the slings and arrows of what many might justifiably consider to have been righteous hindsight.

Post-war domestic abuses of intelligence resources are a matter of history. Even so, most observers today will concede that many of the “abuses” are more clearly perceived as such when seen through the eyes of the citizen of the 1970s than through the eyes of citizens of the 1930s, 40s, or 50s, when the relevant activities were initiated. The interim years had elevated personal privacy rights

to pedestal heights and sharpened the analysis of Constitutional guarantees against government intrusion. As each passing day made it less likely that communism would absorb the United States, apocalyptic post-war fears receded to focus on more personal concerns. Tolerance for “Big Brother” decreased, and government increasingly was put on a tighter leash.

In this climate, the Church Committee began its well-known probe of United States’ intelligence activity. It inquired, *inter alia*, into the scope of U.S. covert action, its value, its techniques, and its necessity.¹⁶ It questioned whether covert action had become a substitute for decision-making, whether a covert capability should be maintained, and, if so, whether it should remain in the CIA.

The Committee pointedly concluded its analysis with the observation that covert action was *not* included in the CIA charter (the National Security Act of 1947), but conceded that the Act had a savings clause to provide for contingencies. Specifically, the Act empowered the CIA to “perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.”¹⁷ Relying on this clause, the National Security Council did issue a series of directives specifying the CIA’s covert mission.¹⁸ Then came the invasion of South Korea.

As with Germany, World War II’s end left Korea divided into spheres of influence. The Soviets controlled the North and the United States the South. Unlike the European experience, however, both powers withdrew, leaving the Koreans to settle their own quarrels. The result was a conflagration that threatened bipolar stalemate. In this situation, covert operations seemed especially desirable.

With modest beginnings in Korea, covert operations quickly supplied their own justification. By 1953, moderate successes in Korea had prompted the authorization of covert operations in forty-eight countries.¹⁹ As covert capability matured and expanded, it became necessary to create within the CIA the Directorate for Plans (DDP) to absorb and make more efficient the covert action capability.²⁰ This was not merely a matter of efficiency. Organizing the DDP reflected concern for the expansive interest shown by the Soviet Union in the Third World and a felt need to combat that interest.

Covert actions of this era were extensive, varied, and expensive—and wholly Executive in origin. All were undertaken pursuant to the inherent, albeit nebulous, Constitutional authority of the President. There is room, of course, for traditional legislative/executive debate over the Constitutional authority to authorize covert action, but, at least in that period of our history, it

is quite likely that Congress wanted no part of the covert operations tar baby. Senator Leverett Saltonstall explained Congressional inactivity this way:

It is not a question of reluctance on the part of CIA officials to speak to us . . . it is a question of our reluctance . . . to seek information . . . on subjects which I personally, as a member of Congress and as a citizen, would rather not have. . . .²¹

Legislative Initiatives

Not until 1974 did Congress seriously begin to consider a role for itself in covert operations. Up to that time, the only outlet for Congressional concerns over covert action had been the traditional briefing process, but the expansive growth of covert actions soon proved this to be inadequate. According to one of the modern architects of covert action, Clark Clifford, the use of covert action had become a primary official activity which simply had "gotten out of hand."²² Congressional remediation, equally traditional, was legislation.

Frustrated generally by lack of knowledge,²³ and specifically by massive covert operations (and expenditures) in Peru, Congress amended the Foreign Assistance Act to deny expenditures for covert operations unless, a Presidential finding of importance to the national security preceded the operation.²⁴ The Hughes-Ryan Amendment also mandated a reporting requirement and increased the number of committees to be informed of covert actions. It was, to be sure, watershed legislation, but for many it was simply too little too late. In the final analysis, the Amendment was ineffective because it lacked teeth; nevertheless, Congress had thrown down a marker.

Soon thereafter, a long-smoldering conflict between Nicaragua and Honduras erupted. Politically, the United States looked with disfavor on the Nicaraguan regime and adopted a policy of supporting Honduras, or, more accurately, of opposing Nicaragua. U.S. actions in support of Contra guerrillas were both overt and covert, each prompting substantial criticism and venting emotions not unlike those of the Vietnam era. One result was an amendment to the 1983 Defense Appropriations Bill designed to end all aid to the Contras.²⁵ Originally a classified addition to the 1983 Intelligence Authorization Act, the Boland Amendment restricted the use of appropriated funds to overthrow the Sandinista government and limited CIA covert operations to the interdiction of Nicaraguan arms supplies.

Of course, the Boland Amendment accomplished neither goal. Of little more substantive effect than the Hughes-Ryan amendment, yet another spark

was required to rekindle Congressional scrutiny and to prompt an oversight role. Two were quickly forthcoming.

The first catalyst was a second legislative “fix,” dubbed Boland II. This legislation prohibited military or paramilitary support for the Contras by the CIA, DoD, “or any other agency or entity involved in intelligence activities.”²⁶ The net result, according to Bud McFarlane, National Security Advisor, was to transfer the responsibility to the National Security Council staff, because “The President had made it clear that he wanted a job done.”²⁷ The “job,” unfortunately, would include an ineptly conceived plan to interrupt commerce by mining Nicaraguan harbors. It was a covert action that quickly lost its covertness in implementation.

This “covert” action prompted an international outcry,²⁸ as well as adverse international legal opinion.²⁹ Worse, however, was the domestic controversy. The Nicaraguan mining affair resulted in truly vitriolic debates over covert action, with the predictable result of diminishing public acceptance for the tactic.

Kindling even greater consternation, however, was the second spark—the Iran-Contra affair. Executive Order 12,333 vested in the CIA exclusive jurisdiction over “special activities,” a euphemism for covert action, “unless the President determines that another agency is more likely to achieve a particular objective.”³⁰ At the time of drafting, it was generally assumed that the “other agency” would be the Department of Defense, but the vagueness of the language permitted the White House itself, through the NSC staff, to engage directly in a covert action, with disastrous results.³¹

After this disgrace, covert action acquired something of a pariah status. In the wake of “Iran-Contra” and Nicaraguan mining, covert action translated as “dirty tricks,” somehow antithetical to the “American way.” American reluctance to countenance either government secrecy or official failure was reinforced and the undesirable nature of covert action seemingly confirmed.³²

The result of national anguish over these “failures,” not necessarily wise, not necessarily unwise, was new legislation that defined covert action.³³ It was not definition that Congress sought, however, but rather a threefold means of gaining limited procedural control and limited oversight of covert action. First, it sought to gain more timely information from the President concerning Executive intent to implement covert actions. Second, Congress intended to limit the ability of the President to avoid accountability to Congress with “plausible deniability.”³⁴ Finally, Congress decided to opt for a very a limited measure of fiscal control over the broad Executive authority to authorize a covert action.

The implementation of these procedures includes oversight authority vested in the intelligence committees. Importantly, the legislation prohibits authorization of a covert action, or expenditure of appropriated funds for one, unless the President *first* makes a written finding, specifying the action arm of government, that the activity is necessary to support identifiable foreign policy objectives, *and* that it is important to the national security.³⁵ It further requires that the intelligence committees be kept fully and currently informed.³⁶

Covert Action: The Congressional View

A commonly accepted, though noninclusive, list of covert actions and, presumably, of “special activities” is propaganda,³⁷ political action,³⁸ paramilitary operations,³⁹ coup d’etat, and intelligence support.⁴⁰ Whatever it might include, the legislation clearly rejects the definition of “special activities” found in Executive Order 12333.⁴¹ The reason for the rejection, however, is marginally helpful.

The drafters intended to exclude the over-broad concept of foreign policy interests from their definition of “covert action.” The vast reach of foreign policy simply makes it necessary to negate that frame of reference. The clear intent was to create an imprecise but manageable definition that would limit reporting only to a class of activities that the drafters believed should be brought to their attention.

Neither the statute nor the statutory history cogently defines the activities included in the concept of events designed to influence political, economic, or military conditions abroad. That, however, is inherently rational. An excessively rigid statute easily could eliminate altogether any capability for covert action by levying conditions that would make secrecy implausible or by demanding too much prior definition of operations that require flexibility and decision-making in the field.

Recognizing the “easier said than done” nature of their effort, Congress set about to define by exclusion the scope of their interest in covert action. The statute, and most of the legislative history, focus on what covert action is *not*.⁴² To oversimplify, excluded from Congressional oversight are the traditional activities of the military, the intelligence community, diplomats and law enforcement officers. Remaining to be included, therefore, are covert paramilitary operations, propaganda, and covert political activities—and whatever the “nontraditional” counterparts to the exempted activities might be.

The statutory history makes clear that “covert action” is intended to include even nonattributable efforts in support of a noncovert activity. The *sine qua non* of a covert action, however, is not secrecy, whether in whole or in part, but rather plausible deniability. If plausible deniability is not viable, or if it is not to be claimed, the activity undertaken simply is not a covert action. Therefore, even “activities undertaken in secret but where the role of the United States will be disclosed or acknowledged once such activities take place are not covert actions.”⁴³

Covert Action in Practice

The practical problem, however, is more subtle than mere secrecy and deniability. Chicken and egg issues are a natural concomitant of covert action. Frequently it is impossible logically to differentiate between covert actions and exempted activities. Payments for intelligence acquisition may strengthen the coffers of dissident groups sufficiently to mount a successful revolution. Is the purpose to gain intelligence or to influence events? The two have very different legislative consequences. Support given to local intelligence or police organizations might have the effect of neutralizing hostile intelligence services, but also of gaining valuable intelligence information. Which is the collateral effect? Does the potential for an unintended consequence trigger reporting?⁴⁴

Similarly quixotic is the distinction between forceful and non-forceful intervention. No longer defined merely by territorial integrity, international stability now rests on myriad complex and intangible features. In turn, this means that covert action, with its undercurrent of manipulation, easily can tip the fine balance of national and international perceptions and fears. A covert operation to support paramilitary forces may have the effect of influencing political programs; but just as likely, support for political programs may promote esteem for dissident paramilitary organizations. The natural effect of foreign policy, whether covert or overt, and regardless of the use of force, may be lowering the threshold for what will be perceived as unacceptable intervention.

Despite the risks, the United States’ experience in this century seems to confirm a national self-interest in maintaining a covert action capability. It is as true today as ever in history that a covert action adjunct of foreign policy remains necessary. It is also true, however, that covert operations come with an ever-increasing cost. Inaptly applied, covert action can be a damaging instrument. Unfortunately, covert action and plausible deniability can be seductive.

Secrecy gives the covert enterprise a poignant emphasis. Absent the glare of sunlight and the public impact of overt force, covert action easily can become a beguiling adventure. History indicates that policy makers sometimes find it an irresistible temptation to opt for covert action in lieu, rather than in support, of foreign policy.⁴⁵ Used as a knee-jerk substitute for policy, it is rarely effective; more importantly, the failure of a covert option puts the option at risk for the future. Used properly, covert actions may serve national and even international needs.

The Balance

Therein lies the legislative purpose. Although the precise authority for covert action is debatable, it is clear that both the Congress and the Executive believe it a necessary option. Both presume that legal authority exists to engage in covert action and each presumes to have a Constitutionally authorized, if not precisely defined, role.

The legal authorities for covert action were discussed in the Church Committee's *Final Report*, without closure, and continue to be debated today. In asserting its current role, Congress legislatively created procedural requirements precedent to the Executive authorizing covert action. The laudable intent was to ensure coherent policy, but it is a goal that requires surgical skill. The reasons for this are threefold.

1) *Secrecy*: Although covert action is generally acknowledged to be a valuable tool of statecraft, it is a limited tool, wholly dependent on an acceptable measure of secrecy. A failure of secrecy risks the foreign policy to which the covert action is dedicated, exposes national warts, and, in the extreme, may leave only the distressing options of withdrawal or overt military intervention. Painful experience demonstrates that secrecy is as perishable as it is necessary. The concomitant of secrecy likewise is threefold.

a) *Need to know*: To maintain secrecy, it follows that operational knowledge must be narrowly restricted. Removing knowledge from the effective controls of the Executive, and committing it to the less constrained legislature, puts the enterprise and those involved at additional risk. That does not mean the risk is unreasonable, merely that it exists.⁴⁶

b) *Reasonable scope*: Perhaps more important is the barnyard bromide that one shouldn't bite off more than one can chew. Covert actions must be of a sufficiently limited scope and duration that they can be accomplished within the parameters of secrecy. History demonstrates that overly ambitious undertakings are likely to lose their mantle of secrecy.

c) *Practical benefit*: There is a practical side to secrecy as well. Normally, secrecy will be required to ensure the safety of persons involved. Not infrequently, secrecy is required to preserve the covert option for a repetitive, future use. Sometimes it is even useful to take advantage of an opportunity to cast another in the role of unscrupulous actor.⁴⁷

2) *Plausible deniability*: Unlike clandestine operations, which are intended not to be known at all, covert operations generally are known, but the national actors remain invisible. The reason for this essential feature harkens to concepts of both sovereignty and diplomacy. The nation-state system that grew out of the Peace of Westphalia (1648) hinges on sovereign inviolability, for lack of which international instability historically has been the result. However, nations *do* interfere with the internal affairs of other nations; therefore, a means of preserving stability *despite* interference with sovereign rights is required.

To lessen the risk of war or political polarization of states, the ability of the actor to disclaim responsibility, and of the affected nation to disclaim knowledge, is a necessary charade. Without plausible deniability, nations would be forced into humiliating political retreat and to curtail, or even sever, diplomatic ties in the face of a sovereign affront. At the extremes, even war can result.

3) *Political Judgment*: Finally, the most subjective and least manageable problem associated with shared Constitutional powers is the exercise of shared political judgment.⁴⁸ The real question is not whether both the executive and the legislative branches of government have a role in foreign policy; rather, it is how each may fulfill its perceived role without bringing to fruition the very real problem of interfering with the other.

Legislation is inherently inflexible and slow to be displaced, even when national needs change. Executive decision-making capability can be prompted, for good or bad, by the exigencies of the moment. Cutting Solomon's baby in half, we should expect that legislation affecting covert action, properly considered, would (1) slow impulse, but not impede decision-making, with procedural rather than substantive requirements; (2) promote executive decision-making that takes into account popular will, and, (3) permit the Executive to remain sufficiently flexible to meet changing or novel circumstances. Objectively, the Congressional attempt to control covert action seems to meet these goals.

A Potent Option

By any standard, covert action is less offensive than overt intervention, but it remains politically risky.⁴⁹ Such are the sensitivities of nations that today

even economic or political coercion may be viewed with the same jaundiced eye as the world once viewed physical intervention.⁵⁰ This will certainly be the case as the tensions of the Cold War continue to dissipate. With the world less concerned about global conflict, intrusive behavior that once might have been tolerated as anemic warfare, or justified as a measure of extra-legal justice, will become less acceptable. Nevertheless, just as overt but coercive diplomatic and economic activities will be tolerated, even if condemned, so will covert actions.

There are limits, however, beyond which the American public will not countenance covert action and both the executive and legislative branches of government must know and respect those limits. The bottom line is that the President cannot, without repercussion, engage in a covert action that the people would not approve *were they to know of the facts and circumstances*. The Congress, without covert action capabilities itself, has chosen to serve as the people's overseer.

With what is hopefully the wisdom of Solomon, both the executive and legislative branches publicly acknowledge a willingness to engage in covert action. The world knows, if it cares to know, that the U.S. is willing to interfere in the internal affairs of other sovereigns. It knows also that Congressional involvement negates the probability, if not the possibility, of a rogue executive. Finally, the world also must presume that the American citizenry would, if it could be fully informed, approve the covert actions undertaken.

What makes the United States unique is that we dislike the fundamentals of our own policy. We take national pride in promoting self-determination, public disclosure, and public diplomacy. We dislike secrecy. We dislike covert action.

Still, despite our moralistic foundation, we sidestep Westphalian sovereignty and acknowledge a commitment to secret foreign policy. Even we find it anomalous that we will interfere with the internal affairs of other nations. But ours is, after all, a unique culture.

Notes

1. During the 1950's, when covert action was a growing business, it included "political and economic actions, propaganda, and paramilitary activities, . . . planned and executed . . . to conceal the identity of the sponsor or else to permit the sponsor's plausible denial of the action." See, e.g., U.S. SENATE, I FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94th Cong., 2d Sess. (1976), at 540 (hereinafter FINAL REPORT). The meaning is largely unchanged today.

2. The United States is not without a history of intelligence activities. Indeed, it has a rich history, but a checkered one, not favored with continuity until recently. See STEPHEN KNOTT, SECRET AND SANCTIONED (1996); G.J.A. O'TOOLE, HONORABLE TREACHERY (1991);

Edward Sayle, *The Historical Underpinnings of the U.S. Intelligence Community*, INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE, Spring 1986, at 1.

3. 50 U.S.C. §401 *et seq.*; See also M. LOWENTHAL, *THE CENTRAL INTELLIGENCE AGENCY: ORGANIZATIONAL HISTORY 2* (Congressional Research Service Rep. No. 78-168F, 1978).

4. See, e.g., Exec. Order No. 12,333, 46 Fed. Reg. 59941 ("United States Intelligence Activities," (1981), § 1.11 (b)). That Order, as did its predecessors, publicly assigns to the National Security Agency (NSA) responsibility to establish and operate a unified signals intelligence operation to control, collect, process, and disseminate signals intelligence for national foreign intelligence and counterintelligence; in essence, to read the communications of other nations.

5. See generally M.E. Bowman, *Intelligence and International Law*, INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE, Fall 1995, at 321.

6. See *infra* note 18.

7. See, e.g., 50 U.S.C. § 413b (1996), which expressly limits covert actions to activities which the President finds are necessary to support U.S. foreign policy.

8. By the 1990s, the numbers of nation-States had again dramatically increased, numbering in excess of 180.

9. The Church Committee also defined covert action as "clandestine activity designed to influence foreign governments, events, organizations, or persons in support of U.S. foreign policy conducted in such a way that the involvement of the U.S. Government is not apparent." FINAL REPORT, *supra* note 1, at 131. Today "clandestine" refers more precisely to actions not intended to be known at all or ones ascribed to other actors.

10. See generally JOHN PRADOS, *PRESIDENT'S SECRET WARS* (1986).

11. Plausible deniability became a household phrase with Iran-Contra, but it did not originate then. The term was evolutionary. The Church Committee noted that the term had been used to shield the President from knowledge—placing the onus for covert action on subordinates. Current legislative history clearly shows that Congress intends that the President be unable to use it to avoid accountability to Congress.

12. But cf. KNOTT, *supra* note 2. Knott's excellent treatise on covert operations documents early use by presidents, but, as with intelligence, no expertise ever really developed until World War II, and no singular responsibility for covert operations was assigned until even later.

13. HENRY KISSINGER, *WHITE HOUSE YEARS* 658-659 (1979).

14. President Harry Truman discovered the essential dilemma early. Covert actions required oversight, but he knew that he could not plausibly deny activities too openly discussed at official councils. His solution, in an era of "containment" foreign policy, was to have covert action worked out of a special panel in which he did not participate. See PRADOS, *supra* note 10, at 79. President Dwight Eisenhower, who criticized the Truman foreign policy of containment, quickly learned that the problems of control versus security and plausible deniability were colossal. He, too, came to rely on a special group to run covert operations. By then, however, covert operations had grown so rapidly that secret oversight was more a wish than a reality. See *id.* at 144-148.

15. 1975 testimony of former Secretary of Defense Clark Clifford, cited in FINAL REPORT, *supra* note 1, at 141.

16. Possibly to capture attention, this scrutiny focused initially on assassination before moving to a concentrated focus on the intelligence community and the FBI. See generally AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, Rep. No. 94-465 (1975). The Committee

denounced ill-advised assassination plots, but not assassination itself. Not until President Jimmy Carter banned the technique by Executive Order did it cease to be a potential arrow in the national security quiver.

17. See FINAL REPORT, *supra* note 1, at 153. The language has been slightly modified by subsequent legislation. It now requires that the Director of the Central Intelligence Agency “perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct.” 50 U.S.C. §403-3 (d) (5).

18. E.g., NSC-4-A authorized covert psychological operations and NSC 10/2 authorized covert political and paramilitary operations. Both were directed primarily at the Soviet Union, but, of course, containment policy meant they were geographically unfocused.

19. FINAL REPORT, *supra* note 1, at 145.

20. For a brief description of this process, see John B. Chomeau, *Covert Action's Proper Role in U.S. Policy*, INT'L J. INTELLIGENCE AND COUNTERINTELLIGENCE, Fall 1988, at 407, 410-411. See also PRADOS, *supra* note 10, at 110-111.

21. CONG. REC. S. 5292 (daily ed. Apr. 9, 1956) cited in FINAL REPORT, *supra* note 1, at 149.

22. See FINAL REPORT, *supra* note 1, at 153.

23. The Church Committee noted that covert activities mounted into the hundreds in each of the administrations of Presidents Dwight Eisenhower, John Kennedy, and Lyndon Johnson. FINAL REPORT, *supra* note 1, at 56.

24. 22 Pub. L. 93-559, 50 U.S.C. §2422 (1974). President Gerald Ford personally opposed the personal certification requirement in his recommendations on the legislation. See FINAL REPORT, *supra* note 1 at 58, n. 26.

25. Pub. L. No. 97-377, §793, 46 Stat. 1865 (1982).

26. Pub. L. No. 98-473, §8066, 98 Stat. 1935 (1984). See also Pub. L. No. 99-591 (Department of Defense Appropriations Act, 1987) §9037, 100 Stat. 3341-108; §9045, 100 Stat. 3341-109 (1986).

27. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR WITH THE MINORITY VIEW 48-52 (Brinkley and Engelberg eds., 1988). The National Security Council was, and is, a policy-advising body, not an “agency or entity involved in intelligence activities.”

28. Compare Christopher C. Joyner & Michael A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621 (1985), with John N. Moore, *The Secret War in Central American and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986).

29. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4.

30. Exec. Order No. 12,333, *supra* note 4, § 1.8(e).

31. See HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 216, H.R. REP. NO. 433, at 3-11 (1987).

32. E.g., a covert operation in support of Afghanistan guerilla resistance to the 1979 Soviet invasion remains a source of criticism. In 1997 the United States was still trying to recover Stinger anti-aircraft missiles originally destined to oppose Soviet aircraft but today potentially in the hands of terrorists.

33. 50 U.S.C. § 413b(3); see note 43 *infra*.

34. See, e.g., MARK RIEBLING, WEDGE: THE SECRET WAR BETWEEN THE FBI AND CIA 151 (1994).

35. 50 U.S.C. §413b(a).

36. *Id.*, §413b(b).

37. The dissemination of nonattributable information or communications designed to affect the conditions under which governments act. The substance may be either true or false, or some combination of each.

38. This might consist of advice, money, or physical assistance, with a purpose to encourage desired activities or dissuade those considered hostile.

39. Secret military assistance, usually in the form of training.

40. E.g., security assistance and intelligence training for the leadership of the “right” faction.

41. Two respected authorities argue that the statute was intended to supersede the definition found in Exec. Order No. 12,333. *See* W. MICHAEL REISMAN and JAMES BAKER, *REGULATING COVERT ACTION* 123 (1992). The author respectfully disagrees with the breadth of that statement. Legislative history indicates that the intent was to regulate by procedure only a limited portion of the Order’s concept of activities, not to displace legislatively its broad foreign policy scope. Reisman and Baker criticize the legislative definition as under-inclusive and write more approvingly of the definition in the Hughes-Ryan Amendment. Virtually any definition will be subject to criticism as being either under or over-inclusive, but under-inclusion is consistent with the limited scope of oversight that Congress then thought appropriate.

42. Covert action means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, but does not include:

(1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of United States Government programs, or administrative activities;

(2) traditional diplomatic or military activities or routine support to such activities;

(3) traditional law enforcement activities conducted by United States Government law enforcement agencies or routine support to such activities; or

(4) activities to provide routine support to the overt activities (other than activities described in paragraphs (1), (2) or (3) of other United States Government agencies abroad. 50 U.S.C § 413b(3).

43. S. REP. NO. 85, at 42 (1991), *reprinted in* 1991 U.S.C.C.A.N. 193, 236. Some view this language to indicate that Congress meant to treat all Executive actions intended to remain secret as covert action. This writer believes that view is grossly over-inclusive. Like the issue of unintended consequences, this is a subject deserving of a stand-alone analysis.

44. An even more difficult question is whether any Executive action that is intended to remain secret invokes the statute. Despite the statutory language and its legislative history, this is an issue over which reasonable minds can differ and is, more properly, an issue for separate analysis.

45. PRADOS, *supra* note 10, is a thoughtful study of paramilitary covert actions that, in large measure, reflects this concern.

46. The Hughes-Ryan Amendment, for example, required the CIA to report all covert actions to eight congressional committees, four in each house. While it is difficult to argue against the propriety of Congress being in the “know,” in practical terms this meant sixty members, plus staff, all newly exposed to facts, the mere intimation of which can cause a failure in foreign policy and, perhaps, the death of the actors.

47. One historian, writing of General Washington’s military espionage apparatus, concluded: “It was deemed good propaganda to impute clandestine methods only to the enemy,

thus implying that Britain was unscrupulous and had to use underhanded tactics to succeed.” RHODRI JEFFREYS-JONES, *AMERICAN ESPIONAGE: FROM SECRET SERVICE TO CIA* 9 (1977).

48. In *Little v. Barreme*, 2 Cranch 170 (1805), the Supreme Court limited the foreign policy powers of the President because the Congress had chosen to speak. During a period of hostilities with France, and acting on Presidential orders, the U.S. Navy seized a ship departing a French port. Congress, however, had enacted legislation to halt the intercourse with France which authorized seizure of ships sailing to a French port. Speaking for the Court, Chief Justice Marshall opined that the President's orders would undoubtedly have been lawful had not Congress legislated differently.

49. To illustrate, two covert actions usually cited as successes were Operations “Ajax” in Iran (placing the Shah in power) and “Success” in Guatemala (displacement of President Arbenz). Both were short-term gains, and neither materially affected the balance of power in the Cold War; yet a failure in either might well have forced those nations into the Soviet camp. The truth is that national interest suffers if a covert action fails, particularly so if it is the more visible paramilitary action. While it is impossible to know the real history of all covert actions, covert paramilitary actions do not have a gleaming record of success.

50. See e.g., Mitrovic, *Non-Intervention in the Internal Affairs of States*, in *PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION* 219 (Milan Sahovic ed., 1972).

III

International Law and Naval Operations

James H. Doyle, Jr.

IN THE OVER TWO HUNDRED YEARS from American commerce raiding in the Revolutionary War through two World Wars, the Korean and Vietnam wars, and a host of crises along the way, to the Persian Gulf conflict, peacekeeping, and peace enforcement, there has been a continuous evolution in the international law that governs naval operations. Equally changed has been the role of naval officers in applying oceans law and the rules of naval warfare in carrying out the mission of the command. This paper explores that evolution and the challenges that commanders and their operational lawyers will face in the 21st century.

The Early Years and Global Wars

Naval operations have been governed by international law since the early days of the Republic. Soon after the Continental Congress authorized fitting out armed vessels to disrupt British trade and reinforcement, the Colonies established Admiralty and Maritime courts to adjudicate prizes.¹ American captains of warships and privateers were admonished to “respect the rights of neutrality” and “not to commit any such Violation of the Laws of Nations.”² The first Navy Regulations enjoined a commanding officer to protect and defend his convoy in peace and war.³ In the War of 1812, frigate captains

employed the traditional *ruse de guerre* in boarding merchant ships to suppress trade licensed by the enemy.⁴ President Lincoln's blockade of Confederate ports satisfied the criterion of effectiveness (ingress or egress dangerous) under international law.⁵ The 1870 Navy Regulations directed commanders in chief to strictly observe the laws of neutrality, whether belligerent or neutral, and to comply with the laws of blockade.⁶

For most of the 19th century, sailor-diplomats, in distant waters and with no means to consult with Washington, were practicing and shaping international law.⁷ Commanders combined naval force with diplomacy in dealing with the Barbary Powers, negotiating treaties with Algiers and Turkey, and facilitating early trade with China. In one of the great historical events of that era, Commodore Matthew Perry, acting alone, concluded a treaty in 1854 which opened Japan to U.S. trade. This was followed by Commodore Robert W. Shufeldt's 1882 treaty opening Korea. But with the advent of the telephone cable and worldwide communications, a naval officer's wide latitude to determine foreign policy declined,⁸ but not necessarily his ability to affect war and peace in crisis situations at sea.

Ashore at the Naval War College, then Captain Charles H. Stockton wrote the *Naval War Code of 1900* pursuant to tasking by the Secretary of the Navy.⁹ After a thorough critique by international lawyers, the code, like the Civil War Lieber Code regulating land warfare, strongly influenced the codification of the law of armed conflict in the Hague Conventions of 1907. Professor John Bassett Moore instituted the *International Law Studies* ("Blue Book") series in 1901,¹⁰ while Professor George Grafton Wilson from Brown University lectured at the War College from 1900 to 1937 and edited over seven thousand pages of "Blue Books," "every one of which was intended to provide the naval officer at home and alone in foreign ports with precise answers to problems he might face."¹¹ Thus, with the Hague Conventions, Geneva Protocol of 1925, London Protocol of 1936, and the various naval treaties and conferences in the 1930s, the 20th century marked a new partnership of statesmen, naval officers, and international lawyers working together to develop rules of conduct that govern naval operations. This partnership has continued to this day in the variety of conferences and conventions that followed World War II. These included the Geneva Conventions of 1949¹² and their Protocols Additional;¹³ the Territorial Sea and Contiguous Zone, High Seas, Fisheries, and Continental Shelf Conventions of 1958;¹⁴ the 1972 US/USSR Incidents at Sea Agreement;¹⁵ and the 1982 United Nations Convention on the Law of the Sea.¹⁶ Naval officers have been active participants in all stages of the deliberations and negotiations.

In the actual practice of international law at sea, the global nature of two world wars with powerful belligerents as adversaries stressed the customary and Hague laws of neutrality, particularly contraband, enemy character and blockade, and the rules protecting merchant ships.¹⁷ However, the fundamental principles of a balance between necessity, proportionality and humanity were reaffirmed at Nuremberg,¹⁸ even as it was obvious that the civilian population, and the wounded, sick, shipwrecked, and prisoners of war needed additional formal protection.

The Cold War and Era of Détente

The post-World War II era began with the ratification of the United Nations Charter, whose Articles 51 and 52 recognize the inherent right of self-defense and the right to establish regional organizations to deal with the maintenance of international peace and security. In peacetime operations at sea, the U.S. Navy was guided by both the customary three-mile limit of the territorial sea with the right of innocent passage, and the traditional high seas freedoms that included routine navigation, fleet exercises, naval patrols, flight operations, surveillance, intelligence gathering, and weapon firing, all with due regard for the rights and safety of others. But peace was elusive and the Cold War period from 1945 to 1990 saw at least ten armed conflicts at sea, albeit localized, that involved an application of the laws of naval warfare regarding blockade, quarantine, maritime exclusion zone, mining, visit and search, convoy protection, and targeting merchant ships and neutrals.¹⁹

The Navy recognized a need for formal guidance and issued *The Law of Naval Warfare* (NWIP 10-2) in 1955, based exclusively on the Hague and Geneva Conventions and the customary law of war.²⁰ The Navy also recognized the need for a cadre of international law specialists within the community of naval lawyers, which in 1968 became the Judge Advocate General (JAG) Corps. International law, while continually evolving, was becoming increasingly complex. No longer could the operational commander cope with the myriad of issues involving overseas base agreements, foreign claims, and treaty provisions, as well as the peacetime law of the sea and the rules of naval warfare, without specialized legal advice. During the 1950s and 60s, lawyers from the International Law Division of Navy JAG worked closely with the Politico-Military Branch of the Office of the Chief of Naval Operations to resolve legal issues. Navy lawyers were key players on the delegation to the 1958 Geneva Conventions, and the principal adviser on

national security interests was a vice admiral who was a former Judge Advocate General of the Navy.

Following the failure of the 1960 Conference on the Law of the Sea to reach agreement on the breadth of the territorial sea and the contiguous fishing zone, technology and the rising demand for ocean resources dramatically intensified the race to use the world's oceans.²¹ Navy lawyers were soon immersed in preparations for another law of the sea conference with an ever-expanding community of nations. Emerging and unsettled issues in coastal state jurisdiction, fisheries management, economic zone control, high seas rights, seabed exploitation, environmental protection, scientific research, and dispute settlement had to be reconciled with U.S. security and economic interests. For naval operations the critical challenges were to limit the breadth of the territorial sea to no greater than twelve miles, ensure passage through international straits and archipelagic waters, and maintain traditional high seas freedoms, especially in a new exclusive economic zone. The mobility and presence of naval forces deployed worldwide were, and still are, a cornerstone of U.S. foreign policy—critical to reassuring allies and deterring potential enemies, responding in crisis situations, and carrying out treaty obligations.²² Navy lawyers participated in all phases of the lengthy negotiations and can rightly claim success in satisfying national security imperatives. Even now, they are in the forefront of efforts to ratify the 1982 Convention, since the deep seabed provisions have been reformed and the U.S. has expressed an intention to become a party.²³

Along with the law of the sea negotiations in this era of détente were deliberations on the Protocols Additional to the 1949 Geneva Conventions, SALT I, chemical warfare, nuclear testing, and incidents at sea with the Soviet Union, all of which raised issues that affected naval operations and required legal advice. For example, in the Incidents at Sea negotiations with the Soviet Union, a critical issue was whether the U.S. should accede to the Soviet demand that a fixed distance limit the approach of ships and aircraft. The Joint Staff convinced the Office of the Secretary of Defense (OSD) and the State Department that fixed distances would undermine the U.S. position on the freedom and mobility of its naval forces on the high seas, be inconsistent with the U.S. position against limiting warship access to the Indian Ocean under a "Zone of Peace" proposal, interfere with essential intelligence gathering, and generate endless arguments over violations of some arbitrary and meaningless fixed distance.²⁴ Similarly, following the 1988 Black Sea "bumping" incident, it was important that the U.S. and the Soviet Union hammer out an understanding affirming the customary and conventional right of innocent passage.²⁵

In the aftermath of the Vietnam War, the Department of Defense issued instructions requiring not only training in the law of war, but also legal review of operational plans, contingency plans, and rules of engagement to ensure consistency with applicable domestic and international law, including the law of armed conflict.²⁶ Additionally, new weapon systems and munitions in development were to be examined for compliance with law of war obligations. In 1979, the Joint Chiefs of Staff consolidated a set of worldwide peacetime rules of engagement (ROE) for maritime forces. Operational planners and military lawyers in all services convened to discuss law of war issues, and courses in operational law were established at the Army and Air Force JAG schools, and the Naval Justice School. These seminars and classes were invaluable in clarifying misperceptions as to legal versus policy restrictions. Navy and Marine Corps lawyers were beginning to be trained in oceans law and the law of war. Those assigned to fleet, carrier group, and amphibious commands, and fleet marine force elements, who had been primarily concerned with the administration of military justice, were now expected to render advice in operational law. The culture and requirements were changing rapidly. In this regard, operational law for the Navy and Marine Corps encompasses both the U.S. domestic legislation and public international law that affects naval operations, with special emphasis on oceans law and the rules of naval warfare.²⁷

The New World Order

Nineteen hundred eighty-six marked the beginning of a new dimension of international law at the Naval War College that future historians may well refer to as the "Grunawalt era." Captain Richard J. (Jack) Grunawalt, JAGC, U. S. Navy (Retired), assumed the prestigious Charles H. Stockton Chair of International Law. Grunawalt, a Navy lawyer for twenty-six years, had vast experience in international law, serving as Fleet Judge Advocate, U.S. Seventh Fleet and the senior adviser to both the joint theater commander in the Pacific and the Chief of Naval Operations. With this background and a vision for the future, he instituted a number of initiatives that reinvigorated the international law program at the War College and put the institution in the forefront of the development, debate, and exposition of operational law.

Of great significance, Professor Grunawalt wrote *The Commander's Handbook on the Law of Naval Operations* (NWP 9), which was promulgated by the Department of the Navy in 1987.²⁸ The *Handbook* replaced NWIP 10-2, which, although amended several times, was obsolete. The author wisely chose

to combine in one manual, "The Law of Peacetime Naval Operations," Part I, and "The Law of Naval Warfare," Part II. As has been experienced during the Cold War and is faced even more frequently today, there is no bright line between peace and war. With ethnic conflicts, deep-seated religious animosities, humanitarian tragedies, nations in disarray, and regional aggressors, a crisis anywhere in the world can turn "peace" into war overnight.²⁹ A commander must be prepared to move easily from Part I to Part II of the manual with the advice and counsel of his military lawyer. In addition, there are areas in the law of naval warfare, like neutrality, that cannot be applied without a thorough understanding of the legal divisions of the oceans and airspace in Part I. Part I also covers the international status and navigation of warships and military aircraft, the protection of persons and property at sea, and the safeguarding of U. S. national interests at sea. While the ocean areas and navigational rights are based primarily on the 1982 UN Law of the Sea Convention, Part I also relies on domestic legislation, general international law, and the UN Charter to provide guidance on matters such as asylum, drug interdiction with the Coast Guard, and the right of self-defense. Part II, "The Law of Naval Warfare," explains the principles and sources of the rules, adherence to and enforcement of the law of armed conflict, neutrality, naval targeting, conventional weapons, weapons of mass destruction (nuclear, chemical, biological), noncombatants, and deception during war.

Significantly, both Parts I and II provide guidance on the rules of engagement, with Article 51 the legal foundation for peacetime application and the law of armed conflict the framework for wartime use. In 1981, in airspace over international waters in the south central Mediterranean, two F-14s from the *Nimitz* battle group exercised their right of unit self-defense when they responded to an attack on them by two Libyan SU-22 fighters.³⁰ The rules of engagement are flexible in the sense that they can be tailored for a specific situation. For example, during the Iran-Iraq Tanker War of 1980-1988, after the USS *Stark* was hit by Exocet missiles fired from an Iraqi Mirage F-1, the belligerents were warned by Notices to Mariners and Airmen that U.S. warships would fire if their aircraft approached U.S. ships in a manner indicating hostile intent, unless they provided adequate notification of their intentions.³¹ But as the later USS *Vincennes*-Iranian Airbus incident demonstrated, the most carefully crafted ROE still require the judgment of the operational commander on the scene.³² Rules of engagement may be issued as general guidance covering a range of contingencies, or they may be tailored for a specific operation.

Part II, “The Law of Naval Warfare,” is based on various treaties, conventions, and customary law, and includes the Additional Protocols to the 1949 Geneva Conventions where consistent with U.S. policy. Neutrality under the UN Charter is discussed, as is the London Protocol of 1936 on the protection of merchant ships.³³ Guidance on the latter considers the practice of belligerents during and following World War II. For the benefit of Navy and Marine Corps legal officers responsible for advising commanders, there is an encyclopedic *Annotated Supplement to The Commander’s Handbook on the Law of Naval Operations*, prepared by the Naval War College with the assistance of operational law experts from various commands and organizations. It contains a section-by-section analysis of the *Handbook* with a full discussion of the concepts and sources of the rules. Volume 64 of the “Blue Book” series contains essays by distinguished and respected authorities in international law commenting on the manual and addressing the more controversial and significant areas of operational law.³⁴

Professor Grunawalt explained that the *Handbook* was to be used by operational commanders and staff at all levels of command; that it constituted general legal guidance; and that it would enable the commander and staff to better understand the legal foundations for orders and their responsibilities under domestic and international law in the execution of the mission. The *Handbook* serves as an authoritative demonstration of how the U.S. interprets and applies oceans law and the rules of naval warfare, and, hopefully, will influence the behavior of other nations. Military manuals and handbooks are important both in disseminating operational rules and developing international law.³⁵ The *Handbook* has been distributed widely to foreign governments and their naval leadership. In the short time since publication, it has guided the development of naval manuals in a number of allied nations and coalition partners. Additionally, international lawyers and naval experts, who from 1988 to 1994 prepared the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, found the *Handbook* to be a major source in formulating a progressive statement of the law of naval warfare.³⁶

For the future, the *Joint Law of War Manual* is in preparation by a task group of Army, Navy, Air Force, Marine Corps, Joint Staff, and Department of Defense operational law experts.³⁷ The sections on the war on land and the war in the air and space will replace out-of-date Army and Air Force manuals. The section on war at sea will be an overview with the *Handbook* remaining intact to provide more detailed guidance. Joint Chiefs of Staff Publication 3-0, *Doctrine for Joint Operations*, states that “As with all actions of the joint force, targeting and attack functions are accomplished in accordance with international law,

the law of war, and international agreements and conventions, as well as rules of engagement approved by the National Command Authorities for the particular operation. Military commanders, planners, and legal experts must *consider the desired end state and political aims* when making targeting decisions.”³⁸ As the military services train, plan, and conduct joint and multinational operations in accordance with the Chairman, Joint Chiefs of Staff, Joint Vision 2010, it is entirely necessary and appropriate that there be a joint legal manual to guide joint and multinational commanders.

Reorganization of the Naval War College in 1972 had terminated the long-standing International Law Week in which international law scholars met with students to discuss subjects in the field related to naval operations. Although international law was integrated on a piecemeal basis into various naval warfare courses, the study of international law was left without a place in the core curricula of the resident courses. This fragmentation and de-emphasis of international law also reduced the effectiveness of the Stockton Chair, with the result that there was no international law support within the Center for Naval Warfare Studies, which provides the College’s strategic research and war-gaming focus. In early 1988, at a meeting with the President and the Dean of the Center for Naval Warfare Studies, Professor Grunawalt proposed that an oceans law and policy research activity be established in the Center to support the War College, the Judge Advocate General, and the entire Navy in the study, instruction, war gaming, and research in international and operational law.³⁹ Following up immediately in a letter to the Chief of Naval Operations, endorsing the initiative, the President noted that “the range of international law issues currently at play in the Persian Gulf encompasses such diverse yet critically important areas of the law of the sea and the law of armed conflict as the high seas freedoms of navigation and overflight, innocent passage of the territorial sea, transit passage of straits, neutral and belligerent rights, naval targeting, mine and counter-mine warfare, the inherent right of self-defense, and flag nation authority and responsibility over merchant shipping. Each of these oceans law and policy concepts impact upon and are reflected in the rules of engagement provided to the operating forces by the National Command Authorities. While the situation in the Persian Gulf provides sharp and immediate focus to the application of international law in crisis management, the role of oceans law and policy in routine peacetime operations, in strategic and contingency planning, and in the execution of the Freedom of Navigation Program, is no less important.”⁴⁰ Thus, the Oceans Law and Policy Department was born, and Jack Grunawalt accepted the appointment as the first Director in July 1989.

With eventual staffing of Navy, Marine Corps, Army, Air Force, and Coast Guard officers experienced in operational law, the Oceans Law and Policy Department in ten short years has revolutionized the role of the Naval War College in operational law. At the tenth annual meeting of the Operational Law Workshop and Advisory Board, the many activities of the Department were reviewed. The instruction programs on the national level include courses in oceans law, the law of armed conflict, and rules of engagement. They are taught at the War College, Surface Warfare Officers School, Naval Justice School, Submarine School, Naval Strike and Air Warfare Center, Joint Targeting School, Coast Guard Prospective Commanding Officers and Executive Officers School, Naval and Air Force Academies, Submarine Group 10, and the Military Sealift Command. Both line officers and lawyers receive instruction. Internationally, the courses are taught in a number of countries by Grunawalt and his staff—Argentina, Chile, Colombia, Ecuador, Germany, Japan, Mexico, Panama, Peru, South Korea, Uruguay, and Venezuela. Operational law instruction on a seminar basis is also provided to operational commanders and staffs at the fleet level in the Navy, Marine Corps, and Coast Guard. The sessions with the operational commanders and planners are critical in fostering understanding, respect, and a spirit of teamwork between the commanders and their military lawyers in dealing with the complex and evolving challenges in operational law.

A typical three-day course in operational law covers general principles of international law, the U.S. national security organization, law of the sea, freedom of navigation operations, protection of persons and property at sea, maritime law enforcement, law of armed conflict, weapons and targeting, neutrality, blockade, maritime interception operations, and rules of engagement. The ROE portion includes lessons learned from operations in Libya, Beirut, Grenada, Panama, Somalia, Haiti, Bosnia, the USS *Stark* and *Vincennes* incidents, Desert Shield and Desert Storm, and the “friendly fire” shootdown of the Army Black Hawk helicopter in northern Iraq. In addition, UN military operations other than war and noncombatant evacuations are analyzed.

In conjunction with these activities, the Department updates the *Commander's Handbook* and the *Annotated Supplement*, publishes the “Blue Book” series, coordinates the activities of the Stockton Chair, periodically holds conferences in operational law, and conducts research into such diverse areas as the legal regime for the Straits of Hormuz, Greek-Turkish confidence-building, intervention, and Bosnian Implementation Force (IFOR) operations.

With these new initiatives and programs, the Naval War College has become the focal point and corporate memory for matters of oceans law and policy affecting operations at sea by U.S. and allied navies. With operational law firmly established, the War College has the capability to conduct long-range planning in the law of the sea and naval warfare, detached from the day-to-day legal issues that consume the time and resources of the various agencies in Washington and the fleet staffs. The consolidation of the Navy's Doctrine Command, Maritime Battle Center, and Concepts Development Group and Strategic Studies Group with the Naval War College will greatly facilitate the integration of oceans law and policy with command and operational doctrine. Integrating doctrine with long-range thinking, teaching, war gaming, research, and naval studies will be invaluable in sorting out Navy requirements, priorities, and programs, as well as strategy and tactics. Operational law should be a part of that process. With staffing and support from all the services, constant interaction with the military lawyers in the battle groups and expeditionary units, the fleet and theater commands, the Joint Staff, and OSD, and the attendance at ocean law conferences convened by operational commanders, the War College is a key player in the joint arena. In this regard, the College's Operational Law Workshop and Advisory Board (another Jack Grunawalt initiative) is important in the oversight of the Oceans Law and Policy Department and provides a unique forum for an exchange of fresh ideas.

In reflecting on the history of international law at the Naval War College, it can be said without exaggeration that Professor Jack Grunawalt's legacy as Director, Oceans Law and Policy Department, Center for Naval Warfare Studies, will equal or surpass the mark made by Professors Charles H. Stockton and George Grafton Wilson in the early days of the institution.

In the actual practice of operational law during the Persian Gulf War, the Department of Defense observed that training in the law of war was reflected in U.S. operations. Furthermore, adherence to the law of war impeded neither coalition planning nor execution. The willingness of commanders to seek legal advice at every stage of operational planning ensured respect for the law of war throughout Desert Shield and Desert Storm. There were difficult issues that had to be dealt with at every echelon of command, e.g., targeting to avoid collateral damage and injury to civilians, the use of civilians and hostages as human shields, environmental terrorism, ruses and perfidy, treatment and repatriation of prisoners of war, war crimes, the conduct of neutral nations, the role of the International Committee of the Red Cross and human rights groups,

and responding to disinformation. In a politically charged atmosphere, commanders and their lawyers were under constant media scrutiny as they planned and carried out joint operations.⁴¹

Between April 1992 and November 1995, U.S. armed forces participated in a wide range of air and naval operations in support of United Nations Security Council Resolutions aimed at terminating the ethnic-based conflicts raging within the former Yugoslavia.⁴² By the time the fighting ended in late 1995, the U.S. and its allies had flown more than 109,000 sorties, just slightly less than the number flown by Coalition forces during the Persian Gulf War. Navy and Marine Corps aircraft were involved in the following operations:

Provide Promise (2/93-1/96)—providing air cover for air delivery of relief supplies;

Deny Flight (4/93-12/95)—enforcing the ban on military flights over Bosnia and Herzegovina;

Sharp Guard (6/93-6/95)—enforcing the complete embargo on deliveries of weapons and military equipment to Yugoslavia;

Deliberate Force (8/95-9/95)—conducting air strikes against the Bosnian-Serb Army and providing air defense suppression, close air support, combat air patrol, and search and rescue, supplemented by Tomahawk missiles launched from a U.S. Navy Aegis cruiser.

These military operations in the other-than-war category (MOOTW) illuminated complicated issues of law and policy that had to be dealt with by commanders and their military lawyers in a political environment in which UN and NATO participants held differing views regarding the future of Bosnia and its neighbor States. Procedures for coordination and liaison at each level of the command chain were required since both the UN and NATO had to consent before military force could be applied. Detailed rules of engagement and other operational constraints had to be formulated in order to avoid both casualties within NATO and UN forces and unnecessary loss of life or damage to property within Bosnia itself. U.S. commanders and staff had to take the lead in devising the complex and sensitive terms of reference, mission statements, command arrangements, rules of engagement, and target selection that are mandatory in MOOTW coalition operations that involve a wide variety of aircraft types from various nations. The Bosnian air operations were successful in that there was an overall lack of significant collateral damage to life and property. However, there were instances of an inability to deliver ordnance on specific ground targets because of an immediate and serious threat to NATO forces, UN peacekeeping forces, or to Bosnian civilians. Furthermore, NATO's ability to suppress helicopter flights in the no-fly zone was only partially effective due

to the political costs of mistakenly shooting down a helicopter with civilians aboard or a UN helicopter. The tragic shoot-down of the Black Hawk helicopter during this same time period illustrates the importance of effective coordination, communications, identification, and deconfliction procedures, in addition to detailed ROE.

In a counterpart to the air operations over Bosnia and pursuant to UN Security Council Resolutions, NATO and Western European Union (WEU) warships began maritime interception operations (MIO) in the Adriatic Sea to monitor compliance with the embargo on goods in and out of Yugoslavia.⁴³ After several months of interrogations which determined that violations were indeed occurring, the Security Council authorized action by boardings, inspections, and diversions under chapters VII and VIII of the UN Charter. Enforcement was extended to prohibit all commercial maritime traffic from entering the territorial sea of Yugoslavia when it was discovered that “contraband” ships were making an end run through the territorial sea to avoid enforcement. NATO and WEU forces were then consolidated into one operation called Sharp Guard. From 1992 to 1996, Sharp Guard surface ships challenged nearly 75,000 merchant ships, boarded and inspected 5,951 at sea, and diverted and inspected 1,480 in port. Maritime patrol aircraft flew 7,151 sorties in support. As a result of these efforts, no ships were reported to have broken the embargo or sanctions during the almost four years that the operations were in effect.⁴⁴

The critical issues to be sorted out in maritime interception operations are command and control, rules of engagement, and communications. The Adriatic MIO began in a parallel command structure with NATO and the WEU each controlling their respective warships. This structure was similar to the Persian Gulf MIO in that the U.S. and the UK each exercised control over their own forces, with the added feature that Arab/Islamic nations utilized a lead nation concept for controlling their ships. This trifurcated command arrangement was developed on an *ad hoc* basis and required extensive coordination. The Coalition Coordination, Communications, and Integration Center (C3IC) was used to exchange intelligence and operational information, and coordinate enforcement action. In the Adriatic, once Sharp Guard was in effect, operational command of NATO and WEU ships was centralized under the Commander in Chief, Allied Forces Southern Europe. This was a highly effective and ideal structure with NATO ships well trained in NATO procedures. However, future MIOs with coalition forces will probably have to formulate their own *ad hoc* command and control structure.

In rules of engagement, the Sharp Guard unified command used NATO ROE, which greatly simplified the problem. However, there was a confusion factor since French, U.S., and UK ships were in the Adriatic operating under their respective national ROE and then would rotate into the MIO and change to NATO ROE. But even under the ideal, single NATO ROE, commanders and staff still had to sort out issues of interpretation such as what constitutes a hostile act or hostile intent, and what kind of disabling fire is authorized. Communications connectivity and interoperability have been continuing challenges in multinational operations. In Sharp Guard, communications were facilitated by common training, language, publications, similar equipment, and NATO procedures. For future MIOs, a great deal of prior planning will be necessary to resolve technical problems and insure that compatible communication equipment is available.

Maritime interception operations have become an important method of enforcing economic sanctions. Legally, they are in a category of their own, but have features of blockade (probably pacific blockade), visit and search, contraband, and quarantine. Whether the particular MIO is pursuant to a Security Council resolution or justified by individual or collective self-defense, notification of the terms, conditions, limitations, area affected, and enforcement action is required. It is interesting to note that the enforcement action often included diversion for inspection in port or just diversion, as well as boarding and inspection at sea, rather than detention, capture, or confiscation. The *San Remo Manual* provides for diversion as an alternative to visit and search.⁴⁵

The Challenges Ahead

For the foreseeable future, U.S. naval forces will be deployed worldwide in support of national interests. This was emphasized when the *Nimitz* Carrier Battle Group was ordered into the Persian Gulf ahead of schedule in 1997 as a warning to Iran and Iraq to stop incursions into the U.S.-enforced “no-fly” zone in southern Iraq.⁴⁶ As the Chief of Naval Operations has stated, “Our global presence insures freedom of navigation in international trade routes and supports U.S. efforts to bring excessive maritime claims into compliance with the law of the sea.”⁴⁷ Volume 66 of the “Blue Book” series documents excessive claims that affect the territorial sea, international straits, overflight, archipelagic sea-lanes passage, and navigation in the exclusive economic zone.⁴⁸ Many of the actions taken under the U.S. Freedom of Navigation Program, including diplomatic efforts and peaceful assertions of the rights and

freedoms of navigation and overflight recognized in international law, are described. The volume also details how international agreements, as well as U.S. domestic legislation on the protection of the marine environment and marine resources, have the potential, in their application and enforcement, to infringe on the exercise of traditional high seas freedoms of navigation and overflight. Excessive maritime claims can also hamper military operations in international waters and airspace to stem the flow of illegal drugs into the United States. In addition to countering excessive maritime claims, the challenges ahead affecting naval operations in “peacetime” include protecting the sea routes of international trade, particularly straits, insuring access to critical oil and gas resources, maintaining access to the high seas for telecommunications, upholding the sovereign immunity of warships and other public vessels and aircraft, continuing to participate in efforts to protect the marine environment and enhance the management of fisheries, and modifying naval operational practices to limit sources of pollution from warships. Protection of the marine environment is a major issue of concern and cannot be compartmentalized. For example, technical solutions and new equipment are required to process waste from ships. Continued U.S. leadership in the International Maritime Organization is essential.

In the area of naval warfare, there are factors that must be considered before the commander and his lawyer can deal with the individual rules. Much of modern international law has been a movement to limit state sovereignty. There have been remarkable advances in human rights and the protection of the environment as a result of the initiatives and efforts of non-governmental organizations (NGOs), thus presaging an increasing role for NGOs in international law.⁴⁹ Joint Vision 2010 points out that “future leaders at all levels of command must understand the interrelationships among military power, diplomacy, and economic pressure, as well as the role of the various government agencies and branches, and non-governmental actors, in achieving our security objectives.”⁵⁰ In actions under chapter VII of the UN Charter, effective participation will most likely be limited to the great powers, i.e., States with a resource base and an internal political organization that enable the leadership to clarify global interests and, if necessary, mobilize sufficient domestic support to enable them to deploy an adequate military force.⁵¹ For the U.S., this will mean working through Presidential Decision Directive 25 (PDD-25) to ascertain whether the two-tier criteria are met in order to permit U.S. involvement in UN peacekeeping operations.⁵² Also, there are Congressional concerns about involving U.S. forces in UN operations, expressed, e.g., in proposed legislation prohibiting U.S. forces from serving

under foreign operational control and restricting the sharing of intelligence information.⁵³

In what has been termed the third great revolution in history, developments in computers and telecommunications have dramatically reduced the effects of time and distance. The ability of television to broadcast instantaneous images of international crises has created new challenges for diplomats, government officials, and military commanders and their lawyers, and a demand for an immediate policy and legal response. Enormous pressure is put on the military commanders not only because their tactics and casualties are scrutinized instantaneously, but also because media reports impact the morale of soldiers, sailors, and airmen.⁵⁴

Military Operations Other than War are focused on deterring war and promoting peace but, as recent experience indicates, often involve the use or threat of force. In such cases, Joint Pub 3-0, Doctrine for Joint Operations, directs that military force be applied prudently. "The actions of military personnel and units are framed by the disciplined application of force, including specific ROE. In operations other than war, ROE will often be more restrictive, detailed, and sensitive to political concerns than in war. Moreover, these rules may change frequently during operations. Restraints on weaponry, tactics, and levels of violence characterize the environment."⁵⁵ In future MOOTW, achieving a balance between the level of violence necessary to accomplish the mission and the force essential to protect our own and friendly forces will be a challenge. This balance was reached in Deny Flight and Deliberate Force by limiting strikes to air defense sites and only expanding the target base on a graduated basis when Serbian forces violated UN conditions. To minimize collateral damage, precision-guided munitions comprised more than 90 percent of the air-to-ground ordnance delivered by naval aircraft, in contrast with less than 2 percent used during the Persian Gulf War. Restraints on target selection will sometimes be decided at the political level with UN and coalition participation. In Operation Earnest Will (reflagging and protecting Kuwaiti tankers during the Iran-Iraq Tanker War), after the USS *Samuel B. Roberts* hit an Iranian laid mine, the National Command Authority decided that the appropriate and proportionate response was to attack Iranian oil platforms, attacking Iranian ships only if they fired on U.S. ships.⁵⁶ More recently, in the Bosnian operation under the Dayton Accords, the former Implementation Force (IFOR) commander and his military lawyer had to take a strong stand in the political negotiations to get rules of engagement with the flexibility to use force commensurate with accomplishing the mission.⁵⁷ In the area of individual and unit self-defense, a difficult issue will be to define in the

ROE what constitutes a hostile act or intent *in the light of new technology, weapons, means of delivery, countermeasures, and tactics* so that defensive action can be taken in anticipation of an imminent attack in accordance with the *Commander's Handbook*.⁵⁸

In future wars, the "goal is to win as quickly as possible and with as few casualties as possible, achieving national objectives and concluding hostilities on terms favorable to the United States and its multinational partners."⁵⁹ However, there will still be challenging issues to resolve involving targeting, collateral damage, over-the-horizon weapons, protection of merchant ships, medical transport, civilian aircraft, noncombatants,⁶⁰ the environment, and self-defense, especially if the armed conflict is limited in scope and area. The mingling of civilians with combatants will present problems in targeting to avoid civilian casualties, particularly with the increasing use of "stand-off" weapons to minimize exposure to casualties.⁶¹ In the Iraqi Mirage attack on USS *Stark*, the pilot followed standard Iraqi policy on target discrimination by firing on the largest radar return believed to be in the Iranian war zone. Iraq accepted responsibility for an erroneous attack.⁶² In the regime of self-defense during the Persian Gulf War, the former Commander of the Naval Forces had to resolve convoy escort responsibilities among multinational ships, particularly as to whether a convoy commander operating under national rules of engagement could respond in self-defense to an attack on a foreign flag ship in his convoy.⁶³ In this regard, it is important to remember that the rules of engagement have to be clear and concise for implementation by commanders and subordinates *who may not have an operational lawyer or access to legal advice*. In the environmental arena, international outrage at the depredations visited upon Kuwait and upon the waters of the Persian Gulf during the Gulf War drew renewed attention to the ongoing debate among environmentalists, scientists, lawyers, policy makers, and military officials as to whether international law was adequate to protect our natural heritage. Volume 69 of the "Blue Book" series documents the proceedings of the Symposium on the Protection of the Environment during Armed Conflict held in 1995 at the Naval War College and attended by national and international government officials, legal scholars, scientists, and operational commanders.⁶⁴ It is obvious that in future armed conflicts, the protection of the environment will be a major issue. The Persian Gulf War, Bosnian peacekeeping, maritime interception operations, and other events since emergence of the New World Order demonstrate that there continue to be more than enough legal issues of substance to focus the attention of the commander and his operational lawyer. The Commander of U.S. Naval Forces Europe reported that in a twelve-

month period during 1996-1997, his naval forces participated in thirteen joint and combined operations involving peacekeeping, peace enforcement, noncombatant evacuations, and humanitarian missions.⁶⁵

The Commander and Operational Lawyer

The practice of operational law in the Navy and Marine Corps has matured significantly since the days of line officers acting alone and a few international law specialists at the Washington level grappling with issues of oceans law and the rules of naval warfare. Now, there are trained and experienced operational lawyers working in the Office of the Secretary of Defense, the Joint Chiefs of Staff, the Offices of the Chief of Naval Operations, Commandant of the Marine Corps, Judge Advocate General, the Naval War College, and most importantly, on the staffs of joint, theater, fleet, battle groups, expeditionary units, and other major operational commands. With satellite communications and secure radios, these experts can rapidly communicate, share opinions, receive guidance, make recommendations, get additional material, and do all that is necessary to develop the best legal advice for the commander. Then, using the *Commanders Handbook*, the Joint Chiefs of Staff peacetime rules of engagement, the National Command Authorities wartime rules of engagement, and policy directives, detailed guidance can be formulated and promulgated to subordinate commanders and those tasked to perform the mission. In this process, it is important that operational lawyers have the latitude to exchange ideas, opinions, and tentative recommendations with their counterparts up and down the chain of command, keeping their leaders fully apprised of these contacts and sensitive to concerns about premature disclosure of options that have not yet been approved either as recommendations or directives. In searching for reasoned legal advice, “turf considerations” and “not invented here” attitudes are unhelpful, to say the least. The best operational lawyers are activists—speaking out, offering advice in the planning process, and seeking ways to support the commander in carrying out the mission under the law, but mindful that the commander is ultimately accountable and must weigh political and policy considerations, along with legal, in reaching a decision. In addition, a thorough understanding of what the individual ship, aircraft, expeditionary unit, soldier, sailor, marine and airman are trained to do is essential in this era of joint and combined operations.

For their part, commanders and operational planners at all levels must have an understanding of the fundamental principles of oceans law and the rules of

naval warfare. They must be able to evaluate the advice of operational lawyers, know what questions to ask, and when to listen or not listen. In the worst case, a commander who defers entirely to his lawyer may jeopardize the mission. Mutual trust and respect between the commander and his lawyer are essential in getting the best legal advice. The tone the commander sets with the staff can be critical as to the stature of the lawyer. The operational lawyer who is expected to routinely and actively participate in the planning and decision process can be counted on to render effective legal advice.

Coping with the complex and changing issues of oceans law and the rules of naval warfare in the 21st century requires a *team effort* by the commander and the operational lawyer. The former Commander, Implementation Force and Allied Forces, Southern Europe, states that his military lawyer was a key player and part of his daily planning and war council team, sitting right next to him, actively participating in evaluating options, and offering advice in reaching decisions.⁶⁶ In a similar vein, the former Commander Naval Forces, Central Command, during the Persian Gulf war, observed that he had great rapport with his lawyer, who was an active participant on the staff and was invaluable in dealing with the legal and policy issues during the war.⁶⁷ At the National Security Council level, the former Chairman, Joint Chiefs of Staff, observed that his Navy lawyer was indispensable in sorting out the legal and policy issues involved in the use of force and rules of engagement, and ensuring that the Chairman's views on these issues were represented in interagency debates and the decision-making process.⁶⁸

With that kind of teamwork, and mutual trust and respect, there is no doubt that commanders and operational lawyers, in the Jack Grunawalt tradition, will meet the challenges of the 21st century.

Notes

1. See CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* (1960).

2. Letter from American Commissioners in France to Commanders of Armed American Vessels (Nov. 21, 1777) in 10 *DOCUMENTS OF THE AMERICAN REVOLUTION, 1777*, at 1012–13 (Michael J. Crawford ed., 1996). See letter from American Commissioners in France to French and Spanish Courts (Nov. 23, 1777), in *id.* at 1020–21, justifying the capture of a French ship, allegedly carrying Spanish goods from London to Cadiz by an American privateer and explaining the role of American prize courts in adjudicating prizes.

3. Naval Regulations issued by Command of the President, Jan. 25, 1802 (facsimile, U. S. Naval Institute, 1970). Previously, on Nov. 28, 1775, the Continental Congress adopted a code of naval regulations patterned after the 1749 British regulations governing His Majesty's ships, vessels, and forces by sea. See L. H. Bolander, *A History of Regulations in the U.S. Navy*, 75 *NAVAL INST. PROC.* 1354 (1947).

4. See Michael J. Crawford, *The Navy's Campaign against the Licensed Trade in the War of 1812*, 46 AM. NEPTUNE 165 (1986).
5. See JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 385 (1988).
6. U.S. NAVY REGULATIONS, 1870, art. 94. See also current U. S. NAVY REGULATIONS, 1990, art. 0705 ("At all times, commanders shall observe and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized.")
7. See CHARLES O. PAULLIN, DIPLOMATIC NEGOTIATIONS OF AMERICAN NAVAL OFFICERS 1778–1883 (1912).
8. See DAVID F. LONG, GOLD BRAID AND FOREIGN RELATIONS, DIPLOMATIC ACTIVITIES OF U. S. NAVAL OFFICERS, 1798–1883 (1988).
9. The United States Naval War Code of 1900, *reprinted and critiqued in* INTERNATIONAL LAW DISCUSSIONS, 1903 (Naval War College, 1903). Captain Stockton collaborated with Captain Asa Walker in the preparation of the Naval War Code of 1900.
10. See JOHN B. HATTENDORF ET AL., SAILORS AND SCHOLARS: THE CENTENNIAL HISTORY OF THE U.S. NAVAL WAR COLLEGE (1984).
11. *Id.* at 56.
12. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217; Geneva Convention (III) relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.
13. Protocol Additional (I) to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, and Protocol Additional (II) to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 389, 449 (Adam Roberts and Richard Guelff eds., 1982).
14. Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312; Convention on Fisheries and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138; Convention on the Continental Shelf, Apr. 29, 1958, 17 U.S.T. 471.
15. Agreement on the Prevention of Incidents On and Over the Sea, May 25, 1972, U.S.-U.S.S.R., 26 U.S.T. 1168.
16. Convention of the Law of the Sea *opened for signature* Dec. 10, 1982, art. 308, U. N. Doc. A/Conf. 62/122, *reprinted in* 21 I.L.M. 1261–1354.
17. See W. T. MALLISON, JR., STUDIES IN THE LAW OF NAVAL WARFARE: SUBMARINES IN GENERAL AND LIMITED WAR (58 International Law Studies, 1966); ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA (50 International Law Studies, 1955).
18. The Hostage Case (United States v. List et al.), 11 T.W.C. 1253–54 (1950); See MYRES S. MCDUGAL AND FLORENTINO P. FELICIANO, LAW AND MINIMUM PUBLIC ORDER 525 (1962).
19. See George K. Walker, *State Practice Following World War II, 1945–1990*, in THE LAW OF NAVAL WARFARE: TARGETING ENEMY MERCHANT SHIPPING 121 (65 International Law Studies, Richard J. Grunawalt ed., 1993).
20. THE LAW OF NAVAL WARFARE, NWIP 10–2, *reprinted in* TUCKER, *supra* note 17, at 357–422.

21. See ANN L. HOLLICK, U. S. FOREIGN POLICY AND THE LAW OF THE SEA (1981).
22. See DEPT OF DEFENSE, NATIONAL SECURITY AND THE CONVENTION ON THE LAW OF THE SEA (2d ed. 1996).
23. Message from U.S. President transmitting UN Convention on the Law of the Sea and Agreement Relating to the Implementation of Part XI, S. TREATY DOC. NO. 103-39, 103d Cong., 2d Sess. (1994).
24. See U.S.-U.S.S.R. Agreement, *supra* note 15. See also David F. Winkler, *When Russia Invaded Disneyland*, NAVAL INST. PROC., May, 1997, at 77 (overview of Incidents at Sea negotiations, Nov. 1970-May 1972).
25. Joint Statement by the United States and the Soviet Union, with Uniform Interpretation of the Rules of International Law Governing Innocent Passage, Sep. 23, 1989, 28 I.L.M. 1444-47 (1989).
26. See W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 DICK. J. INT'L L. 393 (1992); J. Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV, Jan.-Feb. 1983, at 46.
27. See Parks, *supra* note 26, on the roots and evolution of operational law following the watershed My Lai massacre during the Vietnam War.
28. Revised in 1989 as NWP 9A, and further revised and promulgated in 1995 as NWP 1-14M/FMFM 1-10/COMDTPUB P5800.7. The 1995 edition expands on the treatment of neutrality, targeting, and weapons; addresses land mines for the first time; and provides a new section on maritime law enforcement and land warfare.
29. General John M. Shalikashvili, Chairman, Joint Chiefs of Staff, *Success Can Breed Forgetfulness*, WASH. POST, Sep. 28, 1997, at C-4.
30. See Roach, *supra* note 26, for a discussion of the peacetime and wartime rules of engagement and the exercise of the right of self-defense in the incident. See also Guy R. Phillips, *Rules of Engagement: A Primer*, THE ARMY LAWYER, July 1993, at 4.
31. See Walker, *supra* note 19, at 162.
32. The Chairman, Joint Chiefs of Staff, after thorough investigation, found that the commanding officer obeyed the rules of engagement in exercising the right of self-defense. In personally briefing Middle East Force major commanders during Earnest Will (reflagging and protecting Kuwaiti tankers), Admiral Crowe said, "If the rules of engagement are going to tilt in any direction, I want them to tilt toward saving American lives." ADMIRAL WILLIAM J. CROWE, JR., THE LINE OF FIRE 208 (1993).
33. The London Naval Treaty IV, 46 Stat. 2858, 2881-2 (1931), contains the identical rules as in the Protocol of 1936.
34. THE LAW OF NAVAL OPERATIONS (64 International Law Studies, Horace B. Robertson, Jr. ed., 1991).
35. See W. Michael Reisman & William K. Leitzau, *Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict*, in *id.* at 1.
36. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) contains sections on general principles, regions of operations, basic rules and target discrimination, methods and means of warfare at sea, measures short of attack, interception, visit, search, diversion, and capture, and protected persons, medical transports, and medical aircraft. Innovations in the Manual include the effect of UN Security Council Resolutions, clarifying the concept of military objective, discussing the rules applicable to zones, elaborating on military operations in various sea areas, and introducing new rules regarding aircraft operations in armed conflict and in the "gray" area between peace and war. The second part of the Manual contains an explanation of each paragraph (rule). These explanations were authored by Professor Salah El-Din Amer, Louise Doswald-Beck, Vice

Admiral James H. Doyle, Jr., Commander William Fenrick, Christopher Greenwood, Professor Wolff Heintschel von Heinegg, Professor (Rear Admiral) Horace B. Robertson, Jr., and Gert-Jan F. Van Hegelsom.

37. Memorandum from Hays Parks, Special Assistant for Law of War Matters, Department of the Army, for the Tenth Annual Operational Law Symposium and Advisory Board, Naval War College (Feb. 27, 1997) (on file with author).

38. Doctrine for Joint Operations, Joint Pub 3-0, III-25 (1995).

39. Memorandum from Richard J. Grunawalt, Charles H. Stockton Professor of International Law, for the Record of the International Law Meeting of 10 Feb. 1988 (Feb. 25, 1988) (on file with author).

40. Letter from Rear Admiral Ronald J. Kurth, USN, President, Naval War College, to the Chief of Naval Operations (Feb. 11, 1988) (on file with author).

41. See U.S. Department of Defense Report to Congress on the Conduct of the Persian Gulf War—Appendix on the Role of the Law of War, Apr. 10, 1992, 31 I.L.M. 612 (1992). See also Steven Keeva, *Lawyers in the War Room*, A.B.A. J., Dec. 1991, at 52, and Parks, *supra* note 26.

42. See Dean Simmons et al., *Air Operations over Bosnia*, NAVAL INST. PROC., May 1997, at 58, for an assessment of the operational lessons learned.

43. See Richard Zeigler, *Ubi Sumus? Quo Vadimus? Charting the Course of Maritime Interception Operations*, 43 NAVAL L. REV. 1 (1996), for a comprehensive analysis of the background, legal justification, conduct of operations, and recommendations for the future regarding the maritime interception operations in the Persian Gulf and Red Sea, in the Adriatic Sea, and in the Caribbean Sea off Haiti. See also LOIS E. FIELDING, *MARITIME INTERCEPTION AND U. N. SANCTIONS: RESOLVING ISSUES IN THE PERSIAN GULF WAR, THE CONFLICT IN THE FORMER YUGOSLAVIA, AND THE HAITI CRISIS* (1997).

44. Interview with Admiral Thomas J. Lopez, USN, Commander in Chief, Allied Forces, Southern Europe, and Commander in Chief, U. S. Naval Forces Europe, in 13 SURFACE SITREP 1-5 (Surface Navy Assoc., Aug.-Sep., 1997).

45. SAN REMO MANUAL, *supra* note 36 at 196.

46. U. S. Dispatches Carrier Group to Persian Gulf, WASH. POST, Oct. 4, 1997, at A8.

47. Admiral Jay L. Johnson, USN, Chief of Naval Operations, *Operational Primacy*, 22 SURFACE WARFARE 3, 5 (May-June 1997).

48. J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* (66 International Law Studies, 1994).

49. See W. Michael Reisman, *Redesigning the United Nations*, 1 SINGAPORE J. INT'L. & COMP. L. 1 (1997).

50. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT VISION 2010, at 1, 28 (1996).

51. See Reisman, *supra* note 49.

52. See Col. James P. Terry, *The Criteria for Intervention: An Evaluation of U. S. Military Policy in U. N. Operations*, 31 TEX. INT'L. L. J. 101 (1996).

53. See George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, 29 WAKE FOREST L. REV. 435 (1994); Myron H. Nordquist, *What Color Helmet?: Reforming Security Council Peacekeeping Mandates*, Newport Papers No. 12 (Center for Naval Warfare Studies, Aug. 1997).

54. See *Diplomacy and Conflict Resolution in the Information Age*, 3 PEACE WATCH (June 1997).

55. Doctrine for Joint Operations, *supra* note 38, at V-3.

56. See Crowe, *supra* note 32, at 187-211.

57. Conversation with Admiral Leighton Smith, USN (Ret.), former Commander International Force (IFOR) and Allied Forces, Southern Europe (Oct. 8, 1997).

58. NWP 1-14M, *supra* note 28, at 4.3.2.1

59. Doctrine for Joint Operations, *supra* note 38, at I-2.

60. See Louise Doswald-Beck, *Vessels, Aircraft and Persons Entitled to Protection During Armed Conflict at Sea*, 1994 BRIT. Y.B. INT'L L. 211, in which a Senior Legal Adviser, International Committee of the Red Cross, analyzes the state of the law and makes recommendations for improvement.

61. See W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381 (1997) (analysis of Israeli artillery fire on a UN compound containing civilians and the right of self-defense). See also Horace B. Robertson, Jr., *Modern Technology and the Law of Armed Conflict at Sea*, in THE LAW OF NAVAL OPERATIONS, *supra* note 34, at 362-83, for a selective review of some of the new technology weapon systems, e.g., Tomahawk and Harpoon cruise missiles, Captor mines, directed energy devices, and depleted uranium ammunition, that are not unlawful *per se*, but can be employed in such a way as to make their use unlawful.

62. See 26 I.L.M. 1427-28 (1987).

63. Conversation with Admiral Stanley Arthur, USN (Ret.), former Commander, U.S. Central Command, Commander Seventh Fleet, and Vice Chief of Naval Operations (Oct. 9, 1997).

64. See PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT (69 International Law Studies, Richard Grunawalt et al. eds., 1996).

65. Lopez, *supra* note 44.

66. Smith, *supra* note 57.

67. Arthur, *supra* note 63.

68. Conversation with Admiral William J. Crowe, USN (Ret.), former Chairman, Joint Chiefs of Staff, Commander in Chief Pacific Forces, and Commander Allied Forces, Southern Europe (Oct. 18, 1997).

III

The Law of War in Historical Perspective

Leslie C. Green

I FIRST GOT TO KNOW JACK GRUNAWALT when I participated in some of the symposia he organized at the Naval War College. I soon realised that he was a great organizer, full of enthusiasm, and possessed of a warm personality. In my two years as Stockton Professor of International Law at the College, I have come to value him as a colleague and friend—and almost as the father of a small family of fellow workers.

As a former British Army officer with a somewhat restricted knowledge of maritime law, I had some fears associated with being in an Oceans Law and Policy Department. But Jack made me welcome and integrated me into his team. It did not take me long to realise that here was a man with catholic interests willing to listen to another's views, even though they might be radical and perhaps even "revolutionary." Discussing one's views with him would often result in a modification of one's radicalism, and certainly a clarification of doubt. It soon became clear that Jack's views and interests were wide in the extreme, and he was obviously prepared to share them.

Having heard Jack lecture and seen his rapport with a class of officers from a variety of commands and countries, I soon recognised that he is a born teacher.

Jack is also very modest. Soon after I joined the College, he told me that he did not consider himself a true professor since he had never held an academic appointment. I reminded him that he held a professorial appointment at a recognized and highly respected institute of specialized and higher learning and that having watched him in action, I know that he is more than adequately entitled to be addressed as Professor.

It is with great delight that I find myself among those of his *amici* contributing to this *Liber Amicorum* in honour of Jack Grunawalt.

It has often been claimed that modern international law is Eurocentric in character. This somewhat chauvinistic attitude is frequently based on comments in the works of the “fathers” of international law, many of whom were Christian monks.¹ It is a view strengthened by pointing out that “[t]he era of the independent territorial State began in earnest with the Treaty of Westphalia in 1648, which ended the Thirty Years’ War and the political hegemony asserted by the Roman Catholic Church.”² Such an attitude, however, tends to minimize the significance of the system that prevailed in ancient and medieval times. From earliest times it had been recognized that some restraints were necessary during armed conflict. Thus, we find numerous references in the Old Testament wherein God imposes limitations on the warlike activities of the Israelites. It is true that the Israelites were frequently enjoined to slaughter all the inhabitants of the cities they captured,³ but this was only when the war was waged at the direct instruction of God and normally against heathens who rejected Him; to show mercy to the enemy would constitute a sin against the Lord.⁴ The Prophets tell us that in other wars the victorious Israelites made the inhabitants of conquered territories slaves unless they paid tribute.⁵ If peace was not accepted upon defeat, the males were to be slain, while women and children were to be spared, but made slaves. The rabbis modified this so that their status became that of servants rather than slaves.

Prisoners of war were to be treated humanely and not slain, as Elisha informed his king when asked if he might kill them.⁶ In the days of the kingdom, this was the common practice, for “if thine enemy be hungry, give him bread to eat; and if he be thirsty, give him water to drink.”⁷ Not only were the innocent to be protected, but precautions were also to be taken not to harm the local fauna and flora, subject to the needs of military necessity. Thus, soldiers were told not to destroy trees or fruit, other than that which was required for food or the building of defenses.⁸ Josephus⁹ interpreted this to mean that the land was not to be set on fire nor beasts of burden slaughtered.¹⁰ In fact, commenting on

Jewish behavior during conflict in biblical times, one commentator has remarked:

The rabbis¹¹ softened the impact of much of the old law through reinterpretation or imaginative explanation. Due to this it seems that the Israelites were indeed a “merciful” people when compared with their neighbours, such as the Assyrians. Although, as in any case, exceptions and violations to regulations occurred, on the whole, the Israelite warriors conducted themselves in a disciplined, restricted manner in accordance with rules and regulations derived from divine inspiration.¹²

It must be borne in mind, however, that, for the main part, the penalty for disregarding the imprecations concerning conduct in combat were punishable only by religious, that is to say divine, sanction.

The Israelites were not the only ancient people to consider it necessary to impose some measure of control on their warlike activities. Sun Tzu maintained that in war one should only attack the enemy armies, for “the worst policy is to attack cities. Attack cities only when there is no alternative.”¹³ As early as the seventeenth century B.C., the Chinese, when resorting to war, limited their activities by a conscious application of principles of chivalry.¹⁴ This may be seen in the refusal of the Duke of Sung’s minister of war to attack an unready enemy, while it was “deemed unchivalrous among Chinese chariot aristocrats [to take] advantage of a fleeing enemy who was having trouble with his chariot (he might even be assisted), [to] injure a ruler, [or to] attack an enemy state when it was mourning a ruler or was divided by internal troubles.”

The sacred writings of ancient India equally sought to introduce some measure of humanitarianism. The *Mahabharata*¹⁵ states that “a king should never do such an injury to his foe as would rankle the latter’s heart, no sleeping enemy should be attacked, and with death our enmity is terminated.”¹⁶ The Laws of Manu, promulgated at approximately the same period, postulate that:

when the king fights his foes in battle, let him not strike with weapons concealed, nor with barbed, poisoned, or the points of which are blazed with fire. . . . These are the weapons of the wicked.¹⁷

Moreover, it was generally recognized that proportionality between the combatants was a requirement, so that elephants should be used only against elephants, in the same way as foot soldiers would fight against foot soldiers.¹⁸ Similarly, the *Ramayana*¹⁹ condemned weapons which could “destroy the entire race of the enemy, including those which could not bear arms . . . because such

destruction *en masse* was forbidden by the ancient laws of war, even though [the enemy] was fighting an unjust war with an unrighteous objective.”²⁰ The *Mahabharata*, too, forbade the use of “hyperdestructive” weapons, since these were “not even moral, let alone in conformity with religion or the recognized rules of warfare.”²¹

In ancient Greece, among the city States:

[T]emples and priests and embassies were considered inviolable. . . . Mercy . . . was shown to helpless captives. Prisoners were ransomed and exchanged. Safe-conducts were granted and respected. Truces and armistices were established and, for the most part, faithfully observed. . . . Burial of the dead was permitted; and graves were unmolested. It was considered wrong and impious to cut off the enemy’s water supply, or to make use of poisoned weapons.²² Treacherous stratagems of every description were condemned as being contrary to civilized warfare.²³

In so far as Rome was concerned, practices:

[V]aried according as their wars were commenced to exact vengeance for gross violations of international law, or for deliberate acts of treachery. Their warlike usages varied also according as their adversaries were regular enemies . . . or uncivilized barbarians and bands of pirates and marauders. . . . [T]he belligerent operations of Rome, from the point of view of introducing various mitigations in the field, and adopting a milder policy after victory, are distinctly of a progressive character. They were more regular and disciplined than those of any other ancient nation. . . . The *ius belli* imposed restrictions on barbarism, and condemned all acts of treachery. . . . [Livy tells us] there were laws of war as well as peace, and the Romans had learnt to put them into practice not less justly than bravely. . . . The Romans [says Cicero²⁴] refuse to countenance a criminal attempt made on the life of even a foreign aggressor.²⁵

The rules of war in both Greece and Rome were, indeed:

[A]pplicable only to civilized sovereign States, properly organized, and enjoying a regular constitution; and not to conglomerations of individuals living together in an irregular and precarious association. Rome did not regard as being within the comity of nations such fortuitous gatherings of people, but only those who were organized on a civilized basis, and governed with a view to the general good, by a properly constructed system of law. . . . Hence barbarians, savage tribes, bands of robbers and pirates, and the like were debarred from the benefits and relaxations established by international law and custom. . . . [A]s to the general practice of war in Hellas, we find remarkable oscillations of warlike policy. Brutal

treatment and noble generous conduct are manifested at the same epoch, in the same war, and apparently under similar circumstances. At times we hear of proceedings which testify to the intellectual and artistic temperament of the Greeks; at other times, we read narratives which emphasize the fundamental cruelty and disregard of human claims prevalent among the ancient races when at war with each other. In Homer . . . hostilities for the most part assumed the form of indiscriminate brigandage, and were but rarely conducted with a view to achieving regular conquests, and extending the territory of the victorious community. Extermination rather than subjection of the enemy was the usual practice. . . . Sometimes prisoners were sacrificed to the gods, corpses mutilated, and mercy refused to children, and to the old and sickly. On the other hand, acts of mercy and nobility were frequent. . . . The adoption of certain, cowardly, inhuman practices . . . was condemned. . . . In reference to the conduct of war in Greece, it is important to remember that it was between small States, whose subjects were to an extraordinary degree animated by patriotism and devotion to their mother-country, that each individual was much more affected by hostilities than are the cities of the large modern States, that every individual was a soldier-politician who saw his home, his life, his family, his gods at stake, and, finally, that he regarded each and every subject of the opposing State as his personal adversary.²⁶

It has been pointed out that the situation in ancient Greece appears to have changed somewhat after Homer's time and that by the fifth century B.C., both Euripides²⁷ and Thucydides²⁸ were able to write of the "common customs (*koina nomima*) of the Hellenes," which, in regard to the law of war, may be summarized as follows:

1. The state of war should be officially declared before commencing hostilities against an appropriate foe; sworn treaties and alliances should be regarded as binding.
2. Hostilities are sometimes inappropriate; sacred truces, especially those declared for the celebration of the Olympic games, should be observed.
3. Hostilities against certain persons and in certain places are inappropriate; the inviolability of sacred places and persons under protection of the gods, especially heralds and suppliants, should be respected.
4. Erecting a battlefield trophy indicates victory; such trophies should be respected.
5. After a battle it is right to return enemy dead when asked; to request the return of one's dead is tantamount to admitting defeat.
6. A battle is properly prefaced by a ritual challenge and acceptance of the challenge.

7. Prisoners of war should be offered for ransom rather than being summarily executed or mutilated.
8. Punishment of surrendered opponents should be restrained.
9. War is an affair of warriors, thus noncombatants should not be primary targets of attack.
10. Battles should be fought during the usual (summer) campaigning season.
11. Use of nonhoplite²⁹ arms should be limited.
12. Pursuit of defeated and retreating opponents should be limited in duration.³⁰

By the time of the wars with Persia, the Peloponnesian War, and the changes in the nature of Greek life, these rules were no longer of general validity.³¹

As to the situation in Rome, and as a commentary upon the effects of its practices, it has been suggested that

[T]he conduct of war [in Rome] was essentially unrestrained. Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and noncombatants. Classical Latin, indeed, lacked even a word for a civilian. The merciless savagery of Roman war in this sense carried on into the invasion period of the fifth and sixth centuries. . . . In practice [,however,] Roman war was not always so savage. But such was the understanding of Roman war with which medieval theorists of war worked, and they erected *bellum Romanum* in this sense into a category of warfare which permitted the indiscriminate slaughter or enslavement of entire populations without distinction between combatant and noncombatant status. This was a style of warfare appropriate only against a non-Roman enemy, and in the Middle Ages this came to mean that Christians ought only employ it against pagans. . . .³²

In line with the practices described in the Old Testament, similar principles applied in the Islamic world. The Caliph Abu Bakr commanded his forces "let there be no perfidy, no falsehood in your treaties with the enemy, be faithful to all things, proving yourselves upright and noble and maintaining your word and promises truly."³³ Similarly, the leading Islamic statement on the law of nations written in the ninth century forbids the killing of women, children and the old or blind, the crippled and the helplessly insane.³⁴ Moreover, during combat, "Muslims were under legal obligations to respect the rights of non-Muslims, both combatants and civilians. . . . [T]he prisoner of war should not be killed, but he may be ransomed or set free by grace."³⁵ However, if it was considered that his death would be advantageous to the Muslims, he might be killed, unless he converted to Islam. Unlike the Old Testament ban on destruction of

the land and its products, Islam permitted the inundation or burning of a city, even though protected persons, including Muslims, might thus be killed.³⁶

During the Middle Ages, rules of chivalry applied as between the orders of knighthood, although these did not operate to protect the foot soldiers or the yeomenry. By the middle of the fifteenth century, a sufficient number of works were being written on the rules of chivalry as to make it possible to say that:

[B]y the 14th century, medieval Christendom had developed a law of arms, the *jus militare*, well understood and applied by the military and feudal jurisdictions of Western Europe. The theoretical bases of that law followed the medieval legal and theological theories of the hierarchy of legal systems, namely, the Law of God, the eternal law; the law of nature; the *jus gentium*, its more practical counterpart; and human positive law. . . . The *jus militare* which governed the conduct of the members of the honourable profession of arms was considered a part of the *jus gentium*, being part of the customs of those who were professional men-at-arms and members of the Orders of chivalry where the standards of Christian and military behaviour were meant to meet. . . . The *jus militare* being seen as a part of the *jus gentium*, the practical legal consequences followed that it was a body of rules understood and applied throughout the length and breadth of Christendom, then subject to the divided régimes of *sacerdotium* and *imperium*, of papacy and emperor. The heralds and older knights were considered *periti* in the law of arms, while writers such as . . . Christine de Pisan, a woman writer whose work *Livre des Fays d'Armes et de Chivalerie* (1407) . . . [were] regarded as authorities and cited in the jurisdictions where the law of arms was applied.³⁷ In the Councils of Princes, in military and feudal courts, learned canonists argued with erudition and skill the complex matters arising out of warfare before the experienced knights who composed the military jurisdictions. In cases of difficulty, the heralds were consulted as the repositories of learning on the law of arms.

These cases were often concerned with claims to ransom, to booty and spoils, rather than with the enforcement of honourable conduct in warfare. . . . So far as trials of soldiers in enemy allegiance were concerned, we see a universality of jurisdiction which is not easy to explain. Doubtless the close nexus of the law of arms with the *jus gentium* went part of the way to explain this. . . . The military calling is seen as a jealous and exclusive one, intimately associated with the concept of honour. . . . The bearing of arms is so much a matter of honour that those who do not bear arms are without honour; it is a matter of honour to be allowed to bear arms. . . . [W]hat we would today call criminal conduct in warfare was seen as a violation of that honour upon which the right to bear arms was based. A medieval war crime is a breach of the law of arms,³⁸ it is more specifically an act *contra fidem et jus gentium*. . . . Honour is the root of the law of arms. Those who commit acts of dishonour act contrary to the faith and honour of a knight.

The law of arms controls and regulates acts of warfare by the professional and chivalric military classes. We can also discern a universality of jurisdiction to entertain such allegations of dishonourable acts in warfare. The law of arms being the measure of such honour binds all those who follow the profession of arms in Christendom and at all places where Christians perform feats of arms. The *jus gentium* of which the law of arms formed part has given us the legacy of universal jurisdiction over war criminality.³⁹

As with ancient India, the orders of knighthood condemned the use of certain weapons, especially those which were not employed in hand-to-hand encounters between the knights themselves, but which enabled a man not of noble birth to strike a knight from a distance. In condemnation of such weapons, the knights found support from the Church. The second Lateran Council in 1139 condemned⁴⁰ the use of the arc and crossbow⁴¹ as hateful to God, a view coinciding with the concepts of chivalry,⁴² which regarded weapons that could be fired from a distance by a person not a member of the profession of arms and out of the potential reach of the intended victim as a disgraceful and improper act. The third Lateran Council reiterated its anathemization of these weapons, and in 1500 the *Corpus Juris Canonici*⁴³ forbade the use of arrows, darts, or catapults, leading Belli to comment that this was done “in order to reduce as far as possible the number of engines of destruction and death.” However, “regard is so far lacking for this rule that firearms of a thousand kinds are the most common and popular implements of war; as if too few avenues of death had been discovered in the course of centuries, had not the generation of our fathers, rivaling God with his lightning, invented this means whereby, even at a single discharge, men are sent to perdition by the hundreds.”⁴⁴

Both Belli’s comment and the ideas underlying the approach of the canonists, as well as the concepts of the Peace and Truce of God, have much in common with the condemnation by Erasmus of the manner in which the medieval knight decked himself for war:

Do you think Nature would recognize the work of her own hand—the image of God? And if any one were to assure her that it were so, would she not break out in execrations at the flagitious actions of her favourite creature? Would she not say when she saw man thus armed against man, “What new sight do I behold? Hell itself must have produced this portentous spectacle. . . . I would bid this wretched creature behold himself in a mirror, if his eyes were capable of seeing himself when his mind is no more. Nevertheless, thou depraved animal, look at thyself, if thou canst; reflect on thyself, thou frantic warrior, if by any means thou mayest recover thy lost reason, and be restored to thy pristine nature. Take the looking

glass, and inspect it. How come that threatening crest of plumes upon thy head? Did I give thee feathers! Whence that shining helmet? Whence those sharp points, which appear like horns of steel? Whence are thy hands and feet furnished with sharp prickles? Whence those scales, like the scales of fish, upon thy body? Whence those brazen teeth? Whence those plates of brass all over thee? Whence those deadly weapons of offence? Whence that voice, uttering sounds of rage more horrible than the inarticulate noise of the wild beasts? Whence the whole form of thy countenance and person distorted by furious passions, more than brutal? Whence that thunder and lightning which I perceive around thee, at once more frightful than the thunder of heaven, and more destructive to man? I formed thee an animal a little lower than the angels, a partaker of divinity; how camest thou to think of transforming thyself into a beast so savage, that no beast hereafter can be deemed a beast, if it be compared with man, originally the image of God, the Lord of Creation?"⁴⁵

As to the role of the canonists in the development of the law of armed conflict, reference should be made to the Peace of God and Truce of God movements. It was apparently the violence of the *milites* raised by feudal lords which:

[F]irst experienced the impetus to restrain violence in the Middle Ages. That impetus was the Peace of God movement, whose initial target was precisely the bullying *milites* and those bands of armed men who lived on the edges of civilization, preying on settled areas. The Peace of God idea originally appeared late in the tenth century; about a generation later came the first appearance of a concept generally attached to it in historical interpretation, the Truce of God, and a century after that, in 1139, following the ban on crossbows, bows and arrows and siege weapons issued by the Second Lateran Council. This last was directed principally at mercenaries, who often were organized into fighting units around one or the other of these highly specialized and destructive weapons. . . . The beginnings of the Peace of God can be identified at the time of the Council of Le Puy in 975 . . . imposing on the *milites* an oath 'to respect the Church's possessions and those of the peasants'—provisions that were ultimately to become the core of the idea of noncombatant immunity in late-medieval just war tradition. . . . The subsequent idea of the Peace of God . . . gradually diminished the protection extended to peasants and their property while making more explicit the immunity of ecclesiastical persons and property. . . . In the next landmark statement of canon law on this subject, that in the thirteenth century *De Treuga et Pace*, peasants, their goods, and their lands had returned to the category of those who did not participate in war and thus should not have war made against them. Gradually, other non-Churchly categories of persons were added to the list of noncombatants, until by the time of Honore Bonet's *L'Arbre des Batailles* in the fourteenth century the listing had come to include all sorts of

secular persons who were noncombatants by virtue of not being knights . . . or not being physically able to bear arms. . . . Peasants and clergy alike were defined in the former way, while such noncombatant groups as women, children, the aged, and the infirm belonged to the latter category. . . . In the shorter run, the effect of the Peace of God was not so much to protect peaceful noncombatants . . . , but to mark off who might legitimately resort to arms and for what end. . . . [I]n the long run, the idea of noncombatant immunity contained within the Peace of God developed into a much more universal concept with far-reaching implications. This is one of the . . . core ideas around which the *jus in bello* of just war tradition developed, and modern humanitarian law of war and moral argument centering on the concept of discrimination are legacies of this slender tenth-century beginning. . . . While the Peace of God aimed at protecting certain kinds of person and their property . . . the Truce of God [beginning with the Council of Toulouges in 1027] aimed instead to eradicate the use of arms entirely during certain periods [—namely the Sabbath, and such holy days as Christmas and Lent—]. . . . Still, the Truce of God applied only among Christians, and this meant that violence could still be employed by Christians against non-Christians during truce periods. In practice this meant that violence could be directed against two main groups: infidels, as in the Crusades; and heretics, as in religious persecution. . . . How did the ban on crossbows, bows and arrows, and siege weapons contribute to [limiting violence]? . . . By the twelfth century the typical mercenary belonged to a well-organized band whose leader sold or bartered their services as a group and then paid his followers.⁴⁶ This was the *condottori* pattern, which reached its zenith in the fifteenth and sixteenth centuries. . . . In the Middle Ages, what held these bands together . . . was expertise in one or another weapon that could be especially telling in the prevailing kind of warfare. Specifically mercenary companies were formed around the possession and skilled use of bows and arrows and crossbows, neither of which were employed by knights but which could be devastating when used against knights, and siege machines, these being so expensive and difficult to transport and requiring so much skill to use properly that wealthy nobles preferred not to own their own but hire mercenary companies specializing in their use. From this it follows easily that the new-style mercenaries could be controlled by constraints placed on the use of their weapons. The knightly class in particular had good reason to favor such restraints, since there was no glory in falling in battle to an arrow shot by a commoner and since siege weapons represented the only significant threat to a nobleman seeking security from attack in his castle. . . .”⁴⁷

The feudal knights were fully aware of the existence of what they knew as the “law of chivalry” or of arms,⁴⁸ which regulated their affairs and which was enforced by a variety of Courts of Chivalry⁴⁹ or specially appointed tribunals. Thus, in 1474, representatives of the Hanseatic cities tried Peter of Hagenbach at Breisach⁵⁰ for administering occupied territories in a fashion “contrary to the

laws of God and of man.” His plea that he was only carrying out the orders of his prince was rejected and he was executed.

Since foot soldiers were not regarded as members of the honorable profession of arms, the rules of chivalry did not apply to them. However, even they were not free to pursue their own fashion of fighting, for this was regulated by national codes of arms which could be enforced by commanders exercising “rights of justice.” Among the earliest of such codes was the “Articles of War” promulgated by Richard II in 1385. This forbade, on pain of death, any robbery or pillage of a church or an attack on a churchman, as well as “forcing” any woman. It also recognized the right of a captor to take his prisoner’s parole, although:

[I]f any one shall take a prisoner, as soon as he comes to the army, he shall bring him to his captain or master on pain of losing his part [of the captive’s property] . . . ; and that his said captain or master shall bring him to our lord the King, constable or marschall, as soon as he well can, . . . in order that they may examine him concerning news and intelligence of the enemy. . . .”⁵¹

This indicates that war was no longer construed as a conflict between individual and individual, but between organized forces with prisoners no longer in a master-and-servant relationship with their captors, but instead, considered as the “property” of the ruler under whose auspices the captor was fighting.

Perhaps more significant from our point of view, and foretelling much of the present law, were the “Articles and Military Lawes to be Observed in the Warres” promulgated by Gustavus Adolphus of Sweden in 1621.

Art. 85. He that forceth any woman to abuse her, and the matter bee proved, he shall die for it.

Art. 88. No souldier shall set fire upon any Towne or Village in the enemies’ Land, without he be commanded by his Captain: neither shall any Captain give any such command unless he hath first received it from us or our General: who so doth the contrary, he shall answer it in the Generals Councell of Warre. . . .

Art. 92. They that pillage or steal either in our Land or in the enemies, . . . without leave, shall be punish’d as for other theft.

Art. 94. If any man give himselfe to fall upon the pillage before leave be given him so to doe, then may any of his Officers kill him. . . .

Art. 96. No man shall presume to pillage any Church or Hospitall, although the Strength be taken by assault; except he be first commanded, or that the Souldiers and Burgers be fled thereinto and doe harm, from thence; who dares the contrary, shall be punished. . . .

Art. 97. No man shall set fire upon any Hospitall, Church, Schoole, or Mill, or spoyle them in any way, except he be commanded; neither shall any tyrannize any Churchman, or aged people, men or women, maides or children, unless they first take up arms against them, under paine of punishment. . . .

Art. 98. No souldier shall abuse any Churches, Colledges, Schooles or Hospitalls; . . . no souldier shall give any disturbance to any person exercising his sacred function or Ministry, upon paine of death.

Art. 113. Our Commanders shall defend the countrey-people and Ploughmen that follow their husbandry, and shall suffer none to hinder them in it.

Art. 116. Whatsoever is not contained in these Articles, and is repugnant to Military Discipline, or whereby the miserable and innocent countrey may against all right and reason be burdened withall, whatsoever offence finally shall be committed against these orders, that shall the severall Commanders make good, or see severally punished unlesse themselves will stand bound to give further satisfaction.⁵²

In 1639 England had a full system of Laws and Ordinances of Warre⁵³ regulating the behavior of forces in the field, forbidding, among other things, marauding of the countryside, individual acts against the enemy unauthorized by a superior, private taking or keeping of booty, or private detention of an enemy prisoner. Similar codes existed in Germany and Switzerland.⁵⁴ To some extent, these codes reflected the principles to be found in various writings on military matters and the law of war, including, for example, those of Ayala, *De Jure et Officiis et Disciplina Militari*, 1582; Belli, *De Re Militari et Bello Tractatus*, 1663; Gentili, *De Jure Belli*, 1612; Legnano, *De Bello, De Represaliis et De Duello*, 1447; and even Grotius, whose seminal work, *De Jure ac Pacis*, 1625, is frequently treated as if it were the fountainhead of all knowledge on the then-existing international law. In the latter work, Grotius emphasizes that war was the normal order of the day. All these to some extent reflected earlier works devoted to the *Loi des Batailles*, and nearly all claimed to be declaring the law that armies were obliged to follow. In many cases, they were mere abstractions based on existing practice, and it is noticeable how much agreement there is across the whole spectrum. These principles drawn from

practice and doctrine are expressive of the customs of war and, to a great extent, constitute what are now known as the customary law of armed conflict. Of the codes it has been said that, combined with the customary rules, they form “le meilleur frein pratique pour imposer aux armées le respect d’un *modus legitimus* de mener les guerres.”⁵⁵

As has been mentioned, the principles of chivalry were of universal application and they frequently confirmed the immunity from attack or capture of hospital staff, chaplains, doctors, surgeons or apothecaries. However, while Belli, basing himself on the writings of Bartolus in the fourteenth century, asserted that during war the “persons of doctors may not be seized, and they may not be haled to court or otherwise harassed, [and] attendants may not search them for the carrying of arms,”⁵⁶ there was no general recognition of this. To a large extent it depended on the discretion of a commander whether medical personnel accompanied his forces and often the only one would be his personal physician. However, Gustavus Adolphus had four surgeons attached to his regiments and the Armada too carried medical personnel, but these only looked after their own. By a decree of Louis XIV of 1708, a permanent medical service was established “à la suite des armées et dans les places de guerre.”⁵⁷ Even before this, during the siege of Metz in 1552-3, François de Guise had summoned the French surgeon Pará “to succour the abandoned wounded soldiers of the enemy and to make arrangements for their transport back to their army.”⁵⁸

By the end of the seventeenth century, occasional agreements were being drawn up between rival commanders for mutual respect towards the wounded and hospitals. A fairly sophisticated agreement of this kind was entered into between the French and English at L’Ecluse in 1759, whereby:

[H]ospital staff, chaplains, doctors, surgeons and apothecaries were not . . . to be taken prisoners; and, if they should happen to be apprehended within the lines of the enemy, they were to be sent back immediately. The wounded of the enemy who should fall into the hands of the opponents were to be cared for. . . . They were not to be made prisoner and might stay in hospital safely under guard. Surgeons and servants might be sent to them under the general’s passport. . . .”⁵⁹

Some twenty years later, in 1780, Péryrlhe proposed international recognition of the principle that the wounded should not be made prisoners of war nor enter into the balance of exchanges.⁶⁰ However, it was not until after the experiences of Florence Nightingale in the Crimea and the publication of Henri Dunant’s *Souvenir de Solferino* in 1862, reporting on the horrors he had witnessed at that battle, that Péryrlhe’s proposal came to fruition, with the

establishment of the International Committee of the Red Cross in 1863⁶¹ and the adoption in 1864 of the first Geneva Convention for the Amelioration of the Condition of the Wounded of Armies in the Field.⁶²

Apart from arrangements and developments of this kind, other customs were evolving. During the Hundred Years War, *guerre mortale*, war to the death, was distinguished from *bellum hostile*, a war between Christian princes when prisoners could still ransom themselves, *guerre guerriable*, fought in accordance with the feudal rules of chivalry, and the truce, which included a temporary cessation of hostilities during which the wounded and dead might be collected, with the resumption of hostilities following a truce considered a continuation of an ongoing conflict, rather than the opening of a new one. Each had its own rules, but they were rules of honor.

In medieval and later European wars, the capture of cities was of major importance and could be effected by surrender or siege and assault. If by agreement, the inhabitants were treated in accordance with its terms, but if by assault, there were no legal restrictions, although churchmen, women and children were frequently spared. Siege required peculiar weapons, both offensive and defensive,⁶³ but as sieges became less frequent and these weapons of less value, they tended to fall into desuetude and came to be considered illegal,⁶⁴ only to be replaced by weapons more suited to the newer methods of warfare.

These developments were in line with others which had ensued by the time of the 1648 Treaty of Westphalia terminating the Thirty Years War. Members of fighting units were now mustered in national armies and war was no longer a matter of personal relations between princely commanders, with the individual soldier entering into a personal contract with his commander—although there are still vestiges within national armies of troops being raised by a particular nobleman⁶⁵—and the individual captor no longer had any rights over his captive. War was now a matter between sovereigns, and for a legally recognized armed conflict to exist there had to be a hostile contention between States by means of organized armed forces under a proper disciplinary system.⁶⁶ At the same time, the old distinction between just and unjust wars⁶⁷ had disappeared, and it had become accepted that any war conducted by a Christian prince was clearly just,⁶⁸ although both Suarez and Vitoria had reservations concerning Spanish claims to the colonization of the new world.⁶⁹

It was not until the American Civil War that there was the first attempt to produce a modern code for the conduct of armed forces in the field. Professor Francis Lieber of Columbia College drew up what became, by order of President Lincoln, Instructions for the Government of Armies of the US in the

Field.⁷⁰ These were so consistent with what were generally accepted practices that they formed the basis for similar codes in Prussia, 1870; The Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Serbia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893.⁷¹ By the Instructions:

[M]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or revenge . . . the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit . . . protection of the inoffensive citizen of the hostile state is the rule. . . . The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished. . . . All wanton violence committed against persons in the invaded country . . . all robbery . . . or sacking, even after taking a place by main force, all rape, wounding, maiming or killing of such inhabitants are prohibited under the penalty of death. . . . Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.”⁷²

Despite the number of countries adopting similar codes, no agreed international document acknowledging this existed, although it was generally accepted that these postulates constituted principles amounting to international customary law and, to the extent that they were not expressly rejected by any State, especially a major military power, nor overruled by any treaty, they are as obligatory as any other rules of international law.

The first international agreement to be generally accepted came at the end of the Crimean War with the adoption of the Declaration of Paris, 1856.⁷³ This was confined to maritime warfare, forbidding the issue of letters of marque, stating that a blockade was only legal if effective, and granting immunity from capture to enemy goods on neutral ships and neutral goods on enemy ships, unless they constituted contraband. Of more general significance was the 1864 Geneva Convention on wounded in the field, already mentioned, which recognized the distinctiveness and immunity of the Red Cross and of personnel wearing this insignia. This Convention was amended and revised in a series of Geneva Conferences extending from 1886 to 1977, with the Conventions of 1949, as added to by the 1977 Protocols, constituting the current body of humanitarian law governing the treatment and protection of those *hors de*

combat, civilians and other noncombatants. This body of law is known as the Geneva Law.⁷⁴

In addition to the work done on behalf of those *hors de combat*, efforts were taking place to control the means of conducting warfare. The Russians had invented a bullet which exploded on contact, and in 1867 called a conference resulting in the Declaration of St. Petersburg. This forbade the use of projectiles weighing less than 400 grammes that were explosive or charged with fulminating or inflammable substances. The Declaration was of general application, applying equally to land and sea warfare. However, its impact was limited since it contained an all-participation clause, rendering it inapplicable in any war in which any belligerent was not a party.

Perhaps more significant than the Declaration, was the accompanying Preamble, which is important to the present day:

[T]he progress of civilization should have the effect of alleviating as much as possible the calamities of war; the only legitimate objective which states should endeavour to accomplish during war is to weaken the military forces of the enemy; for this purpose it is sufficient to disable the greatest possible number of men; this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; the employment of such arms would, therefore, be contrary to the laws of humanity.⁷⁵

This document may be considered the precursor of what is now known as the Hague Law, concerned with the means and methods of conducting operations during armed conflict, which had its origin in a conference called by the Czar in 1874. The Brussels Protocol aimed at revising "the general usages of war, whether with the object of defining them with greater precision, or with the view of laying down, by a common agreement, certain limits which will restrain, as far as possible, the severities of war." To this end a Project of an International Declaration concerning the Laws and Customs of War was drafted in the hope that "war being thus regulated would involve less suffering, would be less liable to those aggravations produced by uncertainty, unforeseen events, and the passions created by the struggle; it would tend more surely to that which should be its final object, *viz.*, the re-establishment of good relations, and a more solid and lasting peace between the belligerent States."⁷⁶

The Project failed for lack of ratifications, but it formed the basis on which L'Institut de Droit International drew up its *Oxford Manual of the Laws of War on Land*. According to the Preface:

[I]ndependently of the international laws existing on this subject, there are certain principles of justice which guide the public conscience, which are manifested even by general customs, but which it would be well to fix and make obligatory . . . [but since it] might be premature or at least very difficult [to obtain a treaty, the Manual could serve as the basis for national legislation, as being] in accord with both the progress of juridical science and the needs of civilized armies. Rash and extreme rules will not be found therein.⁷⁷ The Institut has not sought innovations in drawing up the Manual; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable."⁷⁸

Appreciating the pressures imposed upon the fighting man and the civilian when there is an actual combat, the Institute called upon States to disseminate the rules among its entire population.

The Brussels Project and the Oxford Manual, served to inspire the Czar to call a Peace Conference at The Hague in 1899. This conference adopted a number of Declarations together with a Convention (which was amended in 1907) that still constitute the basic law *in bello*. Recognizing the arrival of a potentially new means of attack, the Conference adopted a Declaration against the launching of projectiles and explosives from balloons or other similar methods. This was replaced in 1907 and remains the only existing international agreement on aerial warfare. Further Declarations ban projectiles, the only use of which is the diffusion of asphyxiating or deleterious gases, as well as the use of bullets which expand or flatten easily in the human body.⁷⁹

Most important of the instruments adopted at The Hague is Convention II of 1899, now IV of 1907, to which is attached a set of Regulations still constituting the basic statement of the law of warfare on land—although its principles are now regarded as so fundamental as to amount to customary law relevant in all theaters. It is, of course, impossible to cover all eventualities or provide for unforeseen developments. For this reason, the parties adopted the Martens Clause:

Until a more complete code of the laws of war has been issued [- and it never has-], the High Contracting Parties deem it expedient to declare that, in cases not included in the [annexed] Regulations, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.⁸⁰

This, in somewhat slightly amended form, appears in virtually every subsequent agreement concerning humanitarian law in armed conflict.

At the 1907 Conference, further Conventions, covering the opening of hostilities, naval warfare, and the rights and duties of neutrals, were adopted.⁸¹ Since each of these contains an all-participation clause, the Martens Clause, with its clear references to chivalry, humanitarianism and accepted usages, assumes increased importance. In addition, to the extent that any of the provisions in the Regulations, Conventions or Declarations are now considered to be declaratory of,⁸² or having developed into, customary law, they will be applicable universally and the wording of the Convention will be treated as expressing that law.⁸³

Hague Convention IV makes no provision for personal liability in the event of its breach, but Article 3 provides that “a belligerent party which violates the provisions of the Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” While this is the first “black letter” acknowledgment of the enforceability of any of the laws of war, it is merely an affirmation of the general principle relating to the liability of a State for breach of treaty or for its tortious wrongs or acts of its subordinates. Prior to the establishment of the Nuremberg International Military Tribunal in 1945,⁸⁴ the only way of proceeding against individual offenders was by national tribunals⁸⁵ applying customary law,⁸⁶ the Regulations,⁸⁷ or, in the case of their own personnel, the national military or criminal code.⁸⁸ Since Nuremberg, nearly all trials⁸⁹ for offenses against the laws of war have made reference to the principles stemming from the judgment of the Nuremberg Tribunal.⁹⁰

Probably, the most important provision of the 1907 Regulations is Article 1 defining the scope of application of the Regulations—armies, militia units, and volunteer forces, provided they are commanded by a person responsible for his subordinates, have a fixed distinctive emblem recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the laws and customs of war. This purview of relevant personnel has been widened somewhat by Protocol I of 1977. However, from the point of view of the serving soldier, Articles 22 and 23, limiting the means of waging war and the use of forbidden weapons (although it may well be difficult for him to know whether a particular weapon issued to him is in fact forbidden), as well as forbidding the imposition of unnecessary suffering, are those most likely to result in personal liability. Even since the adoption of the Protocols, this is still largely the case.

While no Conference has been called since 1907 to revise or update the general laws and customs of war, there have been conventions directed to

specific issues, the protection of cultural property in armed conflict,⁹¹ the prohibition of military or other hostile use of environmental modification techniques,⁹² the use of conventional weapons,⁹³ the production, stockpiling and use of chemical weapons,⁹⁴ and, most importantly, the conference that led to the adoption of Protocols I and II in 1977.

In so far as maritime warfare is concerned, in addition to the Hague Conventions already mentioned, one of which, Convention XII, sought unsuccessfully to set up an International Prize Court, the Declaration of London of 1909,⁹⁵ is important. The Declaration stated that it contained "agreed rules" on blockade, contraband, unneutral service, enemy character, convoy, and resistance to search. Though unratified, its substance was in accord with generally recognized principles and, by and large, was observed during World War I;⁹⁶ as recently as 1960, an Egyptian Prize Court, citing the Declaration, condemned cargo from Israel on a Greek ship seeking to traverse the Suez Canal.⁹⁷

Other agreements relating to sea warfare, specifically submarines and noxious gases,⁹⁸ were adopted in London in 1922, but never came into force, although the provisions on submarine warfare were confirmed by the London Protocol of 1936. Pursuant to the Protocol, in their operations against merchant ships, submarines are required to conform to the same rules as surface vessels.

In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.⁹⁹

World War II practice shows that this rule was more observed in the breach than observance.

Although the parties at The Hague dealt with projectiles from balloons, they did not appreciate the potential importance of air warfare. Experience in World War I indicated that this was an area which should not be ignored, and in 1923 a Conference of Experts drew up agreed Rules of Air Warfare.¹⁰⁰ These Rules, however, have never come into force, although they are generally regarded as having had sufficient influence for it to be said that "to a great extent, they correspond to the customary rules and general principles

underlying the conventions on the law of war on land and at sea.”¹⁰¹ This view was accepted by the Tokyo District Court when considering the legality of the dropping of the atomic bombs on Hiroshima and Nagasaki.

The Draft Rules of Air Warfare cannot directly be called positive law, since they have not become effective as authoritative with regard to air warfare. However, international jurists regard the Draft Rules as authoritative with regard to air warfare. Some countries regard the substance of the Rules as a standard of action by armed forces, and the fundamental provisions of the Draft Rules are consistently in conformity with international law regulations, and customs at that time [1945].¹⁰²

While the United States Department of the Air Force does not recognize the Code as customary law, it does in fact often draw attention to the compatibility of its own rules with those adopted in 1923.¹⁰³ Moreover, to the extent that these Rules may be declaratory of general customary law, they apply to air warfare, and by Protocol I the rules concerning the general protection of the civilian population “apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.”¹⁰⁴

Although the use of poison has been condemned since classical times, poison gas was used during World War I. In 1925 the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was adopted.¹⁰⁵ Many countries contend that this does not extend to non-fatal lachrymose or nerve gases, while others reserve the right to use it, for example, to suppress riots in prisoner-of-war camps. Others state they will only apply it as between themselves and belligerents who have also ratified the Protocol, and yet others claim the right to use gas against a belligerent who has employed it against their forces or those of their allies. While there are reports that gas and other chemical weapons were used by Italy against Ethiopia, by Iraq against Kurdish rebels, and, perhaps during the Gulf War, it is likely that the Protocol would now be regarded as declaratory of customary law, at least so far as first use is concerned. Moreover, as recently as 1993, a further Convention sought to extend the Protocol so as to ban the manufacture, stockpiling, or use of any chemical weapons.¹⁰⁶

Experience in World War II made it clear that the law as it existed in 1939 was no longer adequate, even though, as pointed out by the Nuremberg

Tribunal, the rules embodied in Hague Convention IV and the annexed Regulations “were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war,” and as such applicable to all belligerents, whether party to that instrument or not. The same view was taken of the Geneva Convention of 1929 relating to Prisoners of War,¹⁰⁷ a finding that was particularly important since neither the Soviet Union¹⁰⁸ nor Japan was a party thereto, although Japan stated it would abide by its provisions;¹⁰⁹ Germany contended that it did not apply to protect Soviet prisoners.

Perhaps the most significant development in the law of war to result from World War II was the promulgation of the London Charter establishing the International Military Tribunal at Nuremberg,¹¹⁰ with jurisdiction over crimes against peace, war crimes and crimes against humanity. To the extent that it was merely exercising its jurisdiction in accordance with the Charter, the Tribunal was not itself creating any law. While not directly concerned with regulating the conduct of hostilities, perhaps the major innovation was the holding by the Tribunal that a war of aggression or in breach of treaty was a crime, though criticism may be directed at the manner in which the Tribunal concluded that the Pact of Paris,¹¹¹ whereby the parties renounced war as an instrument of national policy, had made resort to “aggressive” war an international crime; for the Tribunal, it was “not only an international crime: it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”¹¹² Surprisingly, however, none of the accused found guilty of this “supreme” crime, but not additional “lesser” war crimes, was sentenced to death.

As to war crimes in the traditional sense of that term, the Tribunal added little except to hold that status of the accused, even as head of state or commander in chief, would not provide immunity from prosecution, and confirm that superior orders was not a defense to a war crimes charge, but could be pleaded in mitigation. The other innovation was the concept of crimes against humanity. This offense related to breaches of the law against civilians, even those of the same nationality as the perpetrator. While there has been a tendency to assume that this was a major development of a general character, it should not be forgotten that, as defined in both the Charter and the Judgment, crimes against humanity were committed only if they were part and parcel of the war of aggression or of war crimes. Moreover, strictly speaking, once the Tribunal was *functus officio*, this concept should have become of less significance.¹¹³ However, with the development of the law concerning human rights and humanitarian law, and in an attempt to create a system for prosecuting crimes committed in a noninternational conflict, the application

of the concept was widened. Perhaps the most significant statement to this effect is to be found in the Interim Report of the Commission established to investigate crimes committed during the civil war in Rwanda:

If the normative content of “crimes against humanity” had remained frozen in its Nuremberg form, then it could not possibly apply to the situation in Rwanda . . . because there was not a “war” in the classic sense of an inter-State or international armed conflict.

However, the normative content of “crimes against humanity”—originally employed by the Nuremberg tribunal for its own specific purposes in connection with the Second World War—has undergone a substantial evolution. . . .

“[C]rimes against humanity” finds its very origins in “principles of humanity” first invoked in the early 1800s by a State to denounce another State’s human rights violations of its own citizens. Thus, “crimes against humanity” as a juridical concept was conceived early on to apply to individuals regardless as to whether or not the criminal act was perpetrated during a state of armed conflict or not and regardless of the nationality of the perpetrator or victim. The content and legal status of the norm since Nuremberg has been broadened and expanded through certain international human rights instruments adopted by the United Nations since 1945. . . .

The Commission of Experts on Rwanda considers¹¹⁴ that “crimes against humanity” are gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victims.¹¹⁵

It should be pointed out here that many commentators would today question whether such crimes need to be the consequence of a determined policy based on discrimination.

Just as it would now be considered as part of the law that crimes against humanity are not confined to an international armed conflict, so we find that the 1948 Genocide Convention, which deals with acts directed at the destruction of a defined group *qua* group, expressly states in Article 1 that “genocide, whether committed in time of peace or in time of war, is a crime under international law.”¹¹⁶ There should, therefore, be no difficulty in applying this Convention in any conflict, whether international or noninternational, when the acts condemned are directed at a defined group with the intention of destroying its group characteristics. Since most crimes against humanity, as defined in the London Charter or international

agreements on human rights, do not normally amount to offenses as grave as genocide, it should be possible in the future to charge those responsible for genocide with crimes against humanity, without having to prove “intent” for genocide is clearly the gravest of all crimes against humanity.

The General Assembly adopted a resolution Affirming the Principles of International Law recognized by the Charter of the Nuremberg Tribunal.¹¹⁷ As a General Assembly resolution, it lacks any strict legal force, although it embodies great political and moral authority. This authority has been enhanced by the International Law Commission’s enunciation of Principles of International Law recognized by the Charter and Judgment.¹¹⁸ Principle I affirmed the personal liability of anyone committing a crime under international law; Principle II provides that the failure of national law to condemn a particular act does not remove personal liability for that act under international law; Principle III prohibits a head of state from claiming immunity from international criminal liability; Principle IV holds that superior orders cannot be pleaded when a moral choice was open to an accused; Principle V entitles war criminals to a fair trial; Principle VI confirms the criminality of the acts condemned in the London Charter; and Principle VII reaffirms the Tribunal’s finding that complicity in any of these acts is itself a crime. These Principles have been reaffirmed by the Commission in its Draft Code of Crimes Against the Peace and Security of Mankind.¹¹⁹

From the point of view of the law *in bello*, the most important development after 1945 was the adoption of the four Geneva Conventions in 1949. Conventions I, II, and III,¹²⁰—addressing the wounded and sick on land and at sea, as well as prisoners of war—are little more than reaffirmations and extensions of the 1929 Conventions, with amendments directed at filling *lacunae*, which became apparent during World War II. More innovative was Convention IV concerning the protection of civilians in time of war, particularly in occupied territory,¹²¹ an issue which had become of supreme concern in the light of German practice in occupied Europe.

Further, since 1945 it had become obvious that many or most of the conflicts that had occurred or were likely in the foreseeable future were not international conflicts in the normal inter-State sense, but rebellions, revolutions, or struggles for national independence. It is for this reason that the Conventions replace the term “war,” with its inter-State connotation, by “armed conflict” and “enemy” by “adverse party”—although the mind boggles at the idea of an infantry sergeant saying, “Hold your fire until you see the white of the adverse party’s eyes!” In such conflicts, ideological differences frequently result in atrocities far more outrageous than any of those normally inherent in

an international conflict. In view of this, each of the Conventions has, as its Article 3, what may be regarded as a minimal code of humanitarian law to be followed "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." In addition, each contains a definition of those breaches of the Convention which are considered "grave," and which are declared to be criminally punishable,¹²² Parties agree to amend their legal systems to ensure the punishment of such offenses. However, the relevant article never refers to the provisions of Article 3 common to the Conventions. But, if this Article is to have any meaning, it follows that disregard of the provisions therein embodied must be enforceable; thus, offenders must be punishable. Moreover, the offenses listed in the Conventions, regardless of the specific Article concerned, are, for the most part, offenses which would amount to crimes against humanity and be punishable as such. The listing of particular offenses as "grave breaches" does not remove the criminal character from other acts which would amount to war crimes.

Adoption of the Civilians Convention in 1949 was still not regarded as sufficient to satisfy the purpose for which it was promulgated. Therefore, in 1968, the International Conference on Human Rights in Tehran adopted a Resolution calling for Respect for Human Rights in Armed Conflicts,¹²³ although none of its Resolutions carries legal force. However, they introduced a new idea to the effect that those engaged in "struggles" against "minority racist or colonial régimes" should not be treated as traitors but as prisoners of war or political prisoners. This added to the impact of the General Assembly's resolution¹²⁴ confirming the assertion of the 1965 Conference of the Red Cross on the Protection of Civilian Populations against the Dangers of Indiscriminate Warfare:

- (i) the right of parties to a conflict to adopt means of injuring the enemy is not unlimited;
- (ii) it is prohibited to launch attacks against the civilian population, as such;
- (iii) distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.¹²⁵

Carrying the proposals further, the Institute of International Law, at its Edinburgh Conference of 1969, adopted a Resolution on the distinction between military and nonmilitary objects, particularly the problems associated

with weapons of mass destruction.¹²⁶ In view of the status of the Institute, its views cannot be ignored, even though the United States “does not accept them as an accurate statement of international law relating to armed conflict . . . [but] regard[s] as declaratory of existing customary law . . . [the] general principles recognized [and] unanimously adopted by the United Nations General Assembly.”¹²⁷ However, bearing in mind the importance of *opinio juris*, some reference to the Institute’s views must be made.

First, the Institute made reference to the “consequences which the indiscriminate conduct of hostilities and particularly the use of nuclear, chemical and bacteriological weapons, may involve for civilians and for mankind as a whole . . . [and went on to enunciate] the principles to be observed in armed conflicts by any *de jure* or *de facto* government, or by any other authority responsible for the conduct of hostilities.”¹²⁸ It emphasized that the distinction between military and nonmilitary objectives, as well as between combatants and civilians, must be constantly preserved; that neither the civilian population nor specially agreed protected establishments may ever be regarded as military objectives, nor “under any circumstances” may the means indispensable for the survival of the civilian population or those which serve primarily humanitarian purposes; that all existing protective principles of international armed conflict law must be preserved and observed; and that

[E]xisting international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population. . . . [and] prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons), as well as “blind” weapons. [It also] prohibits all attacks for whatsoever motives or by whatsoever means for the annihilation of any group, region or urban centre with no possible distinction between armed forces and civilian populations or between military and non-military objectives.¹²⁹

The General Assembly subsequently adopted a Resolution which broadly accepted the principles laid down by the Institute. However, it went somewhat further, in that, while affirming the principles for the protection of civilians, it asserted that “fundamental human rights, as accepted in international law and laid down in international agreements, continue to apply fully in situations of armed conflict.”¹³⁰ This appears to be a new departure from previous understanding, for it would normally be thought that as *lex specialis* the Hague

and Geneva Law overrode the *lex generalis* of human rights instruments which might be considered applicable in peacetime, especially as these latter instruments usually recognize that most, but not all, of their provisions are derogable in time of emergency, including armed conflict.¹³¹

Since this Resolution was adopted without any opposition, it might be assumed that the members of the international community thought that the principles therein enunciated amounted to an expression of customary law, which would render the United States reservations concerning the Institute's proposals of less significance than they appear at first glance.

There followed the adoption of a Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction in 1972,¹³² but this was silent as to use. Difficulties arose in relation to chemical weapons and a further, as yet unratified, Convention was adopted in 1993 directed against the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction.¹³³

All these proposals with regard to the means and methods of warfare led the International Committee of the Red Cross to propose amendments to the 1949 Conventions in an effort to meet some of the concerns now apparent. The Conference that ensued met from 1974 to 1977 and produced two Protocols supplementing, but not in any way replacing, the 1949 Conventions—I on international and II on noninternational armed conflicts.¹³⁴

Apart from bringing the law up to date, Protocol I makes fundamental changes in the existing law regulating international armed conflicts and, while formally concerned with humanitarian law as propounded in the Geneva law, does in fact add to some of the Hague law concerning means and methods. Most importantly, recognizing the principles of political correctness and concerns regarding self-determination, it provides that struggles conducted by national liberation movements in the name of self-determination are to be considered international conflicts and thus subject to the international law of armed conflict.¹³⁵ It also changes the definition of combatants on behalf of the members of such movements, even though they are not wearing recognized uniforms nor carrying their arms openly save when actually engaged and visible to the adversary while preparing to engage.¹³⁶ The Protocol extends the protection given to civilian and nonmilitary objects and forbids actions likely to have a deleterious effect upon civilians. Thus, it forbids attacks upon narrowly defined "dangerous installations"—dams, dykes and nuclear electrical generating stations. Changing long-recognized law, it defines mercenaries and denies them prisoner of war status. It widens the concept of grave breaches as

defined in the Conventions, and recognizes civil defense as a matter requiring separate acknowledgment. In an effort to make the law clearly understood, it requires legal advisers to be attached to military units, without specifying the level of attachment, and expressly confirms the principle of command responsibility, including the obligation of a commander to ensure compliance with the law by his subordinates by imposing a duty to suppress, repress and punish offenders.

The Protocol reflects many of the principles adopted by the Institute at its Edinburgh meeting, but ignores completely any reference to weapons of mass destruction other than by implication when forbidding long-term damage to the environment or insisting on the preservation of material essential to the sustenance of the civilian population. The reason put forward for ignoring the problems of the nuclear weapon was that this was essentially an issue of disarmament rather than humanitarian law. Nevertheless, when the General Assembly subsequently asked the World Court for an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,¹³⁷ the Court found itself unable to give a direct answer, though it had some difficulty in leaving the issue completely open.

The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict. . . .

[The] two branches of law applicable in armed conflict [—the Hague and Geneva law—] have become so closely interrelated that they are considered to have gradually formed one complex system, known today as international humanitarian law. . . .

Since the turn of the century, the appearance of new means of combat has—without calling into question the long-standing principles and rules of international law—rendered necessary some specific prohibitions of the use of certain weapons. . . .

The cardinal principles constituting the fabric of humanitarian law are [as follows]. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants. States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to

cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. [Accordingly,] States do not have unlimited freedom of choice of means in the weapons they use.

The Court would refer, in relation to these principles, to the Martens Clause . . . which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version . . . is to be found in Additional Protocol I of 1977.¹³⁸

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law. . . . [T]hese fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law [—? *jus cogens*—]. . . .

Turning now to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons. . . .

The Court shares th[e] view [that] there can be no doubt as to the applicability of humanitarian law to nuclear weapons. . . . Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflicts had already come into existence; the Conferences of 1949 and 1974-1977 [which drew up the Conventions and Protocols] left these weapons aside, and there is a qualitative as well as a quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. . . .

Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons. . . .

Although the applicability of the principles and rules of humanitarian law . . . to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are . . . controversial. . . .

[N]one of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the “clean” use of nuclear, low yield, tactical nuclear weapons [—which, in view of their radio-activity, would still be likely to cause “unnecessary” suffering to combatant victims—] has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons [—is this comment of legal significance?—]. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

Nor can the Court make a determination upon the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, . . . the principles and rules of law applicable in armed conflict—at the heart of which is the overriding consideration of humanity—make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons . . . the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstances.

Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.¹³⁹ Nor can it ignore the practice referred to as the “policy of deterrence” [—a legal issue for a Court?—], to which an appreciable section of the international community adhered for many years. . . .

Accordingly, in view of the present state of international law viewed as a whole . . . and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake. . . .¹⁴⁰

As if aware of the somewhat unsatisfactory nature of its answers, the Court referred to the varying views that exist at present on this matter and called for an early conference to settle the entire issue of legality, reminding the members of the international community of their obligation to negotiate in good faith.

Having thus seen the Court's comments on the legality of the nuclear weapon and its reference to the absence of mention in the Conventions or Protocol I, it is perhaps in order to consider the significance of this instrument. Although both Protocols constitute an annex to the Conventions, they do not automatically become part thereof and, as such, binding upon Convention parties. Ratification or accession remains necessary, and there is much debate as to the extent to which the provisions in Protocol I are declaratory of customary law relevant to international conflicts and therefore binding regardless of accession. Perhaps it is sufficient in this connection to refer to the Report submitted by General Colin Powell to the Defense Department of the United States in regard to the Gulf War of 1991 in which the Coalition forces were under his overall command. Many of the combatants in this conflict, including both Iraq and the United States, had failed to ratify or accede. Nevertheless, Powell pointed out that to the greatest extent feasible, the limitations imposed by Protocol I were observed and that "decisions were impacted by legal considerations at every level. . . . [T]he law of war proved invaluable in the decision-making process" in regard to action taken.¹⁴¹ By way of contrast, Protocol II, as the first international effort to regulate such a domestic matter as a noninternational conflict, is clearly innovative.

Even though there has, as yet, been no instrument regulating the legality of the use of nuclear weapons, there has been some progress with regard to conventional weapons, that is to say those not of massive destruction potential, although they may in fact be indiscriminatory. Thus, in 1980, a Convention was adopted on the Prohibition or Restriction on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or Have Indiscriminatory Effects.¹⁴² This comprised three Protocols. The first prohibits weapons "the primary purpose of which is to injure by fragments which in the human body escape detection by X-rays," although it is not believed any such exist or are likely to be invented in the foreseeable future. Protocol II is concerned with land mines, booby traps and other similar devices, its main aim being to protect civilians from such weapons, while at the same time preventing their use against troops in a perfidious manner, as would be the case if they were used in connection with protective emblems or, for example, corpses. Finally, Protocol III prohibits or restricts the use of incendiary weapons if fire is the primary rather than incidental or consequential outcome. While

incendiaries have become of less significance with the increased resort to mechanized warfare, particularly when long-distance (as compared with trench or house-to-house combat), incendiaries remain significant when used against armored vehicles or aircraft. Consequently, the Protocol excludes from its purview.

(i) Munitions which may have incidental incendiary effects, such as luminants, tracers, smoke or signaling systems;

(ii) Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.¹⁴³

This last sub-paragraph leaves one with the impression that the draftsmen were of opinion that “armoured vehicles, aircraft and installations or facilities” exist in themselves, without any human being required to make them militarily effective.

In 1995, a fourth Protocol was added to these three to control the use of Blinding Laser Weapons. As with incendiaries, the ban is only directed at the employment of:

[L]aser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. . . . Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by the prohibition of this Protocol.¹⁴⁴

Interestingly, this would seem to remove one of the considerations normally applicable when construing whether an offense has been committed against the law of war amounting to a war crime. In most cases, it is now accepted that if an illegal consequence amounting to a breach was “foreseeable or considered likely,” liability would follow. In this case, however, even though it is very likely that in using laser weapons against optical equipment blindness may well ensue, such use is not considered to amount to illegality, even though it is known that this is likely to be the case.

It was pointed out earlier that most of the provisions of the law of war are only applicable in the event of an international armed conflict, including such

conflicts as may be considered to be on behalf of self-determination, and that Article 3 common to the four Geneva Conventions does not really carry this much further, unless one is able to argue that breach of the various provisions in that Article amounts to crimes against humanity. The 1977 Additional Protocol II to the 1949 Conventions sought to provide some measure of humanitarian principles into noninternational conflicts. However, the threshold for this Protocol to come into effect is so high that it would exclude almost every noninternational conflict other than one which amounts to a civil war with the antigovernment forces in effective control of some part of the national territory, a requirement which is not imposed in the case of a war for national liberation:

Art. 1 (1) This Protocol . . . shall apply to all armed conflicts which are not [elevated by Protocol I into international conflicts] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹⁴⁵

As if to emphasize this high threshold and to make it clear that there is no undue interference with national sovereignty and the power of a government to deal with opposition and affirm its right to maintain order, the Article expressly declares that the "Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts,"¹⁴⁶ and, as we have just seen, nor would it apply, even if the armed incidents were far more extensive and serious, if those opposing the government were not in control over part of the national territory. Further limiting the possible impact of the Protocol on the conflict, Article 2 makes clear that the Protocol cannot:

[B]e invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State . . . [nor] as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.¹⁴⁷

While the Protocol makes no attempt to suggest that the decision as to "legitimate" means of restoring order belongs to any authority other than the

government concerned, it cannot, despite the ban on intervention, inhibit the Security Council from deciding, as it has in the case of the former Yugoslavia and of Rwanda, that the situation is so grievous that it amounts to a threat to international peace warranting action under Chapter VII of the Charter, and authorizing action despite the traditional reservations concerning nonintervention in domestic affairs.

The cheapest and most easily accessible weapon available to those involved in a noninternational conflict, especially those confronting the governmental forces, are mines and booby traps, but the 1980 Protocol relevant thereto only applies in an international armed conflict. However, since mines and booby traps are so easily made, are relatively inexpensive, and cause extensive injury to civilians even after the conflict has terminated, when the Convention on Conventional Weapons was amended in 1993, Protocol II on mines was also amended.¹⁴⁸ By virtue of this amendment, the Protocol was extended to situations mentioned in Article 3 common to the four Conventions, that is to say to noninternational conflicts—although the reservation with regard to riots and the like was preserved, leaving it open to both combatants in such a situation to behave as indiscriminately in this regard as might please them. While the ban is applicable to all parties, the reservations with regard to sovereignty are also preserved. In an effort to reduce the dangers to civilians, particularly after the end of hostilities, the amended Protocol contains carefully spelled-out regulations concerning the marking and identification of mined areas as well as provision for their ultimate removal. The Protocol does not ban the use of all mines, but only those which are strictly anti-personnel and which lack self-destructive, self-neutralizing, or self-deactivating mechanisms or are fitted with an anti-handling device. While it seeks to limit the use of these mines, the Protocol does not make the obtaining of such weaponry illegal, nor forbid their manufacture or supply to those seeking them. In fact, those countries which are capable of the mass production of mines tend, at present, to be opposed to any international agreement which will limit their right to manufacture or use, especially in circumstances of self-defense, even though they express willingness not to supply them to those countries seeking them on the international market.

This historical introduction to the law of armed conflict has paid most attention to warfare upon land since this is the region for which most agreements have been designed, while the earliest beginnings of regulation were directed to land warfare. Where it has been considered essential, specific reference has been made to both aerial and naval warfare, especially since the principles underlying the laws and customs of warfare on land are general in

character and equally applicable, to the extent that is practicable, to operations at sea and in the air as well. Equally, nothing has been said about neutrality. This is partly due to the fact that in modern war there are few neutrals, particularly when the States which are neutral are weaker than the belligerents and therefore have difficulty in asserting their rights against those of the latter. Moreover, since virtually all States are members of the United Nations and thus bound to carry out any decisions of the Security Council,¹⁴⁹ and, since no military action is legal without Security Council consent or approval, it may be argued that no State can any longer claim to be entitled to the rights traditionally pertaining to neutrality. This is particularly so when operations are undertaken to give effect to a Security Council decision, a matter that became of some importance during the Gulf War of 1991.¹⁵⁰

In addition to any international agreements that may be relevant, as pointed out by the World Court in its opinion on *The Threat or Use of Nuclear Weapons*, the law of armed conflict is still governed by those “principles of international law derived from established custom [—going back to feudal times and before—], from the principles of humanity and from the dictates of public conscience,”¹⁵¹ together with such considerations of proper behavior as amount to general principles of law recognized by civilized nations¹⁵² and, as such, rules of international law in accordance with Article 38 of the Statute of the International Court of Justice. Further, there is nothing to prevent any State from laying down any rules regulating the conduct of its own forces, provided they do not run counter to any established rules and customs of the law of armed conflict, and, as we have seen, breaches of these rules may now be considered as amounting to crimes against humanity, and punishable as such, whether the conflict is one that is international or noninternational in character. Equally, since it is generally accepted that the law concerning armed conflict is of universal interest, there is nothing to stop any individual State, as many have in fact done, from passing legislation granting its courts jurisdiction over breaches of this law regardless of the nationality of the offender or of the victim. Nor is the geographic location of the offense of any significance. Finally, as may be seen with the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, it is open to the Security Council, having decided that a particular conflict, whether international or noninternational, amounts to a potential threat to international peace, to proceed to establish special courts with power to enforce the law and punish offenders.

In fine, perhaps it might be suggested that the time is now ripe for a further effort to be made, perhaps under the auspices of the International Committee of the Red Cross or the International Law Commission, to draw up a revised

and up-to-date statement of what the laws, as distinct from the customs of war, are.¹⁵³ If this should be considered impossible or impracticable, perhaps those States which are of like mind, as for example is the case with the members of the North Atlantic Treaty Organization or those of the European Community with the addition of the United States, would work together to draw up an agreed upon code which will be applicable to their forces and which might serve as an example to be adopted by others.

Notes

1. See, e.g., comments on Vitoria, in S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 12 (1996).
2. *Id.* at 13, citing Leo Gross, *The Peace of Westphalia, 1648–1948*, in *INTERNATIONAL LAW IN THE TWENTIETH CENTURY* 25, 33–46 (Leo Gross ed., 1969).
3. *Deuteronomy* 20:10–18.
4. See, e.g., *1 Samuel* 15, wherein the prophet himself kills Agag.
5. *Judges* 1:28–32.
6. “Thou shalt not smite them: wouldst thou smite those whom thou hast taken captive with thy sword and with thy bow? Set bread and water before them, that they may eat and drink and go to their master. And he [the king] prepared great provision for them: and when they had eaten and drunk, he sent them away and they went to their master.” *2 Kings* 6:22–23.
7. *Proverbs* 25:21.
8. *Deuteronomy* 20:19–20; see also *Exodus* 23:29.
9. FLAVIUS JOSEPHUS, *CONTRA APION* 29 (c. A.D. 93) (William Whiston trans., 1912).
10. Guy B. Roberts, *Judaic Sources of and Views on the Laws of War*, 37 *NAVAL L. REV.* 221, 231 (1988).
11. See, e.g., JULIUS STONE, *HUMAN LAW AND HUMAN JUSTICE* 26–29 (1965).
12. Roberts, *supra* note 10, at 233.
13. SUN TZU, *THE ART OF WAR* 78 (c. fourth century B.C.) (Samuel B. Griffiths trans., 1971).
14. JOHN KEEGAN, *A HISTORY OF WARFARE* 173 (1994), citing HERRLEE G. CREEL, *THE ORIGIN OF STATECRAFT IN CHINA* 257, 265 (1970).
15. Epic Sanskrit poem, based on Hindu ideals, probably composed between A.D. 200 and 300.
16. Cited in W.S. Armour, *Customs of Warfare in Ancient India*, 7 *GROTIUS TRANSACTIONS* 71, 77, 81, (1921).
17. Tit. VII (Georg Buhler trans., 1886) (1976 reprint).
18. Armour, *supra* note 16, at 74.
19. Sanskrit epic of the third century B.C.
20. Cited by Judge Weeramantry in his dissent in the World Court’s advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, July 8, 1996, General List No. 95, at 34, 35 I.L.M. 809, 897 (1996).
21. Cited in Nagendra Singh, *The Distinguishable Characteristics of the Concept of Law as it Developed in Ancient India*, in *LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE* 93 (Maarten Bos & Ian Brownlie eds., 1987).
22. See HOMER, *THE ODYSSEY*, bk. I, lines 260–3 (Richmond Lattimore trans., 1965).

23. 2 COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 221–3 (1911).
24. DE OFFICIIS, III, xxii.
25. PHILLIPSON, *supra* note 23, at 227, 228–9.
26. PHILLIPSON, *supra* note 23, at 195, 207–9, 210; *see also* 212 (*re* the Peloponnesian war).
27. HERACLIDES 1010.
28. HISTORY OF THE PELEPPONESIAN WAR, I.1, I.23, 1–3.
29. “[A]n adult free male could be a hoplite if he could afford the capital investment in the appropriate arms and armor, and could afford to spend a good part of the summer marching about the countryside and fighting when called upon to do so. The typical hoplite was an independent subsistence farmer. . . .” Josiah Ober, *Classical Greek Times*, in *THE LAWS OF WAR: CONSTRAINTS IN WARFARE IN THE WESTERN WORLD* 12, 14 (Michael Howard *et al.* eds., 1994).
30. *Id.* at 13.
31. *Id.* at 18.
32. Robert C. Stacey, *The Age of Chivalry*, in Howard, *supra* note 29, at 27, 27–8.
33. ALIB HASAN AL MUTTAQUI, 4 BOOK OF KANZUL’UMAN 472 (c. A.D. 634) (1979 trans. and ed.) *see also* SHAYBANI SIYAR, *THE ISLAMIC LAW OF NATIONS*, s. 1711 (c. early ninth century A.D.) (Majid Khadduri trans., 1966).
34. SIYAR, *supra* note 33, secs. 29–31, 47, 81, 110–11.
35. *Id.*, secs. 1, 15, 18, 44.
36. *Id.*, secs. 55, 95–109.
37. Concerning the activities of the Courts of Chivalry and other military courts, *see* MAURICE H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* 27, 34 (1965); *see also* PHILIPPE CONTAMINE, *WAR IN THE MIDDLE AGES* 270–7, (Michael Jones trans., 1984), and, generally, 2 ROBERT P. WARD, *AN ENQUIRY IN TO THE FOUNDATIONS AND HISTORY OF THE LAW OF NATIONS IN EUROPE*, ch. XIV (Of the Influence of Chivalry) (1795).
38. *See, e.g.*, the conduct of Henry V at Agincourt in 1415, as commented upon by Shakespeare, *Henry V*, Act 4, Scene 5, lines 5–10, based upon Holinshed’s *CHRONICLES*, and compare with account given by EMERICH VATTEL, *LE DROIT DES GENS*, liv. III, ch.VIII, s. 151 (1758) (Charles G. Fenwick trans., 1916).
39. G.I.A.D. Draper, *The Modern Pattern of War Criminality*, in *WAR CRIMES IN INTERNATIONAL LAW* 141, 142–4 (Yoram Dinstein & Mala Tabory eds., 1996).
40. G.I.A.D. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 5 INT’L REV. RED CROSS 3, 19 (1965).
41. *See* E.R.A. SEWTER, *THE ALEXIAD OF ANNA COMMENA* 316–7 (1969) (“The crossbow is a weapon of the barbarians . . . a truly diabolical machine.”).
42. *See, e.g.*, WARD, *supra* note 37, ch. XIV.
43. Decretal V, *cited in* PIERINO BELLI, *DE RE MILITARI ET BELLO TRACTATUS*, pt. VII, chap. III, 29 (1563) (Herbert C. Nutting trans., 1936).
44. *Id.*
45. DESIDERIUS ERASMUS, *BELLUM* 17 (1545) (Imprint Soc. ed., 1972).
46. For a discussion on “The Status of Mercenaries in International Law,” *see* LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR*, ch. IX (1985).
47. JAMES T. JOHNSON, *THE QUEST FOR PEACE* 78–91 (1987).
48. *See, e.g.*, SHAKESPEARE, *HENRY V*, act 4, scene 7, lines 5–10 (commenting on the reason for Henry’s order at Agincourt to slaughter all the French prisoners, as a reprisal for the

killing of camp followers); *see also, generally*, THEODOR MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS*, 1993.

49. *See, e.g.*, KEEN, *supra* note 37, at 27; *see also*, CONTAMINE, *supra* note 37, at 270-7.

50. *See* GEORG SCHWARZENBERGER, 2 *INTERNATIONAL LAW (THE LAW OF ARMED CONFLICT)*, ch. 39 (1968).

51. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, app. II, 1412 (1896), *citing* FRANCIS GROSE, 1 *ANTIQUITIES OF ENGLAND AND WALES* 34 (1773). Similar codes were issued by Henry V and Henry VIII.

52. *Id.* at app. III, 1416, *citing* ANIMADVERSIONS OF WARRE (Ward trans., 1639).

53. CHARLES M. CLODE, 1 *MILITARY FORCES OF THE CROWN*, app. VI (1869).

54. *See* Andre Gardot, *Le Droit de la Guerre dans l'Oeuvre des Capitaines Français du XVIe Siècle*, 72 *HAGUE RECUEIL* 397, 467-8 (1948).

55. Baron de Taube, *cited in id.* at 467.

56. Belli, *supra* note 43, pt. VII, ch. III, 34.

57. GEOFFREY BUTLER & SIMON MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 134 (1928).

58. *Id.* at 187, n.28.

59. *Id.* at 149-50.

60. *Id.* at 150-1.

61. *THE LAWS OF ARMED CONFLICTS* 275 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).

62. *Reprinted in id.* at 279.

63. *See, e.g.*, CONTAMINE, *supra* note 37, at 102-6, 193-207, 211-2.

64. *See, e.g.*, *THE GERMAN WAR BOOK* 66 (J.H. Morgan ed., 1915). Both the British *MANUAL OF MILITARY LAW*, pt. III (The Law of Land Warfare), para. 110 (1985), and the U.S. *LAW OF LAND WARFARE (FM-27)*, para. 34 (1956), refer to lances with barbed heads, which were extremely useful against mounted knights in armor, as unlawful.

65. *See, e.g.*, the Lovet Scouts attached to the British Army.

66. *See, e.g.*, BORDWELL, *THE LAW OF WARFARE BETWEEN BELLIGERENTS*, ch. IV (1908). Bordwell takes the Dutch Wars of Louis XIV, 1672-8, as the *dies a quo*. *See also* Leslie C. Green, *Armed Conflict, War and Self-Defence*, 6 *ARCHIV DES VÖLKERRECHTS* 387, 394-408 (1957).

67. *See, e.g.*, P.P. SHAFIROV, *A DISCOURSE CONCERNING THE JUST CAUSES OF THE WAR BETWEEN SWEDEN AND RUSSIA* (1717) (William E. Butler trans., 1973).

68. According to NICCOLO MACHIARELLI, 2 *THOUGHTS OF A STATESMAN* (A. Gilbert trans., 1989), "that war is just that is necessary."

69. *See, e.g.*, JAMES B. SCOTT, *THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW* (1934); *see also* LESLIE C. GREEN & OLIVE P. DICKASON, *THE LAW OF NATIONS AND THE NEW WORLD* 39-47, 50-4, 192-8 (1989), and ANAYA, *supra* note 1, ch.1.

70. General Orders No. 100, Apr. 24, 1863, *reprinted in* Schindler & Toman, *supra* note 61, at 3; *see also* Richard R. Baxter, *The First Modern Codification of the Laws of Armed Conflict*, 29 *INT'L REV. RED CROSS* 171 (1963).

71. THOMAS E. HOLLAND, *THE LAWS OF WAR ON LAND* 72 (1908).

72. Arts. 16, 37, 44 & 47.

73. *Reprinted in* Schindler & Toman, *supra* note 61, at 787.

74. Convention I (wounded and sick in the field); II (wounded, sick and shipwrecked); III (prisoners of war); IV (civilians); Additional Protocol I (international armed conflict);

Additional Protocol II (noninternational armed conflict), *reprinted in* Schindler & Toman, *supra* note 61, at 373, 401, 423, 495, 621 & 689 respectively.

75. *Reprinted in id.* at 101.

76. *Reprinted in id.* at 25.

77. This reflects a problem facing every effort to enact rules to modify the rigor of war—the need to compromise between the ideals of the humanitarian and the needs of the military.

78. *Reprinted in* Schindler & Toman, *supra* note 61, at 101, 105 & 109 respectively.

79. (1880). *Reprinted in id.* at 35.

80. *Reprinted in id.* at 63.

81. Hague Conventions III, VI–XII, V and XIII. *Reprinted in id.* at 57, 791–940, 941 & 951 respectively.

82. *E.g.*, art. 7, affirming that a detaining government is obliged to maintain prisoners; art. 12, providing that prisoners breaking parole may be punished; art. 22, stating that the means of injuring the enemy is not unlimited; art. 23, banning the use of poison and of denying quarter; art. 32, protecting one carrying a flag of truce; etc.

83. *See, e.g.*, the *Nuremberg Judgment*: “Several of the belligerents in the recent war were not parties to this Convention [IV]. . . . [B]y 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.” H.M.S.O., Cmd. 6964 (1946), at 65; 41 AM. J. INT’L L. 172, 248–9 (1947).

84. London Charter, *reprinted in* Schindler & Toman, *supra* note 61, at 911.

85. *See, e.g.*, U.N.W.C.C., LAW REPORTS OF TRIALS OF WAR CRIMINALS (1947–9).

86. *E.g.*, The Llandovery Castle (1921) in which officers of a U-boat were sentenced by a German tribunal for, “contrary to international law,” firing upon and killing survivors of an unlawfully torpedoed hospital ship. CAMERON, THE PELEUS TRIAL, app. IX, (1945).

87. *E.g.*, Drierwalde Case (1946), 1 U.N.W.C.C., *supra* note 85, at 81 [killing captured RAF personnel contrary to art. 23(c)].

88. *See* Mueller and Neumann (1921) for cases tried by a German tribunal involving ill treatment of prisoners of war contrary to the German Penal and Military Penal Codes. H.M.S.O., Cmd. 1422, at 26, 36.

89. *See, e.g.*, Buhler Trial, Polish Supreme National Tribunal, 14 U.N.W.C.C., *supra* note 85, at 23 (1948).

90. *See* UNGA Res. 95(I), Dec. 11, 1946, and Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950 Int’l Law Comm., *reprinted in* Schindler & Toman, *supra* note 61, at 921, 923.

91. Schindler & Toman, *supra* note 61, at 745.

92. (1976). *Reprinted in id.* at 163.

93. (1980). *Reprinted in id.* at 179, 35 I.L.M. 1209, 1217 (1996).

94. (1993). 31 I.L.M. 800 (1993).

95. *Reprinted in* Schindler & Toman, *supra* note 61, at 843. *See* Frits Kalshoven, *Commentary on the Declaration of London*, in NATALINO RONZITTI, THE LAW OF NAVAL WARFARE 257 (1988).

96. *See* C. JOHN COLOMBOS, THE LAW OF PRIZE 25–8 (1949); *see also* Kalshoven, *supra* note 95, at 271.

97. The *Astypalia*, 31 I.L.R. 519 (1966).

98. *Reprinted in* Schindler & Toman, *supra* note 61, at 113.

99. *Reprinted in id.* at 883.

100. *Reprinted in id.* at 207.

101. *Id.* See also JAMES M. SPAIGHT, AIR POWER AND WAR RIGHTS 42–3 (1947); HOWARD LEVIE, 1 THE CODE OF INTERNATIONAL ARMED CONFLICT 207–26 (1985).
102. Shimoda v. Japan, 8 JAP. ANN. INT'L L. 212, 237-8 (1963); 32 I.L.R. 626, 631 (1966).
103. UNITED STATES AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (AFP 110–31), para. 5-3(c), (1976).
104. Art. 49(3).
105. Reprinted in Schindler & Toman, *supra* note 61, at 115.
106. See n. 94 *supra*.
107. Reprinted in Schindler & Toman, *supra* note 61, at 339.
108. For Germany's attitude to Soviet prisoners, see *Nuremberg Judgment*, *supra* note 83, at 46–8, 91–2; 41 AM. J. INT'L L. 226–9, 282–3 (1947).
109. See HOWARD LEVIE, DOCUMENTS ON PRISONERS OF WAR doc. 191 (1979). For an account of Japan's treatment of prisoners of war, see, e.g., TOSHIYUKI TANAKA, HIDDEN HORRORS (1996).
110. Reprinted in Schindler & Toman, *supra* note 61, at 911.
111. Kellogg-Briand Pact, 1928, 94 L.N.T.S. 57.
112. *Nuremberg Judgment*, *supra* note 83, at (H.M.S.O.) 13, 39–41; 41 AM. J. INT'L L. 218–20, 486–8 (1947).
113. See, e.g., Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178 (1945).
114. Here the Commission is reproducing words adopted by Commission of Experts on the Former Yugoslavia, U.N. Doc. S/1994/674 (1994) at paras. 84-6.
115. U.N. Doc. S/1994/125 (1994) at paras. 113-8.
116. Reprinted in Schindler & Toman, *supra* note 61, at 231.
117. Res. 95(I), (U.N. GAOR, 5th Sess., Supp. No. 12, Doc A/1316 (1950), reprinted in *id.* at 921.
118. Reprinted in *id.* at 923.
119. (1991). 30 I.L.M. 1584 (1991).
120. *Supra* note 74.
121. *Id.*
122. I - Arts. 49, 50; II - Arts. 50, 51; III - Arts. 129, 130; IV - Arts. 146, 147.
123. Reprinted in Schindler & Toman, *supra* note 61, at 261.
124. Reprinted in *id.* at 263.
125. Reprinted in *id.* at 251.
126. The Distinction Between Military Objectives and Non-Military Objectives, Resolution adopted by the Institute of International Law, Edinburgh, Sept. 9, 1969, 2 ANNUAIRE L'INSTITUT DE DROIT INTERNATIONAL 375 (1969), reprinted in Schindler and Toman, *supra* note 61, at 265.
127. Letter from General Counsel, Dep't of Defense, to Sen. Edward Kennedy, Chairman, Subcommittee on Refugees, Committee of Judiciary, Sept. 22, 1972, 67 AM. J. INT'L L. 122 (1973).
128. *Supra* note 126.
129. *Id.*
130. G.A. Res. 2675 (XXV), reprinted in Schindler & Toman, *supra* note 61, at 267.
131. See, e.g., Leslie C. Green, *Derogation of Human Rights in Emergency Situations*, 16 CAN. Y.B. INT'L L. 92 (1978).
132. Reprinted in Schindler & Toman, *supra* note 61, at 137.
133. 32 I.L.M. 800 (1993).
134. Reprinted in Schindler & Toman, *supra* note 61, at 621 & 689.

- 135. Art. 1(4).
- 136. Art. 44(3).
- 137. General List No. 95, July 8, 1996, 35 I.L.M. 809 (1996).
- 138. "In cases not covered by this Protocol or other international agreements, civilians and combatants remain under the protection and authority of the principles of humanity and from the dictates of public conscience." Art. 1, para. 2.
- 139. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. . . ."
- 140. At paras. 74, 75, 76, 78, 79, 85-7, 90, 94 & 95-7.
- 141. U.S. DEPT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR App. O (THE ROLE OF THE LAW OF WAR), 31 I.L.M. 615 (1992).
- 142. Reprinted in Schindler & Toman, *supra* note 61, at 179 (Protocol I at 185; II at 185; III at 190). See William Fenrick, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, 19 CAN. Y.B. INT'L L. 229 (1981).
- 143. Art. 1(b).
- 144. 35 I.L.M. 1217 (1996).
- 145. Additional Protocol II, *supra* note 74, art. 1(1).
- 146. *Id.*
- 147. *Id.*, Art. 2.
- 148. 35 I.L.M. 1209 (1996).
- 149. U.N. CHARTER Art. 25.
- 150. See, e.g., Leslie C. Green, *The Gulf "War," the UN and the Law of Armed Conflict*, 28 ARCHIV DES VÖLKERRECHTS 369 (1991).
- 151. Protocol I, *supra* note 74, Art. 1(2) (paraphrasing the Martens Clause).
- 152. See, e.g., charges in the *Einsatzgruppen Case* (US v. Ohlendorf, 1947). Charge 10 of the Indictment alleged "acts and conduct . . . which constitute violations of the general principles of criminal law as derived from the criminal law of all civilized nations." 4 U.N.W.C.C., *supra* note 85, at 21.
- 153. See, e.g. ICRC statements: *The Soldiers' Rules*, INT'L REV. RED CROSS 27 (Jan.-Feb. 1978); *Fundamental Rules of International Humanitarian Law Applicable to Armed Conflicts*, in Schindler & Toman, *supra* note 61, at 734; *Non-International Conflicts*, INT'L REV. RED CROSS 278 (Sept.- Oct. 1989). All three are reproduced in LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 335-7 (1993).

IV

Shooting Down Drug Traffickers

Phillip A. Johnson

THIS IS THE STORY of how a United States statute, enacted to combat sabotage of commercial airliners by terrorists, produced the completely unintended result of shutting down a major element of coalition counterdrug operations in South America for seven months. It is also the story of how the United States Government solved that problem, but left unresolved significant international law issues concerning the use of force against civil aircraft suspected of drug trafficking.

Coalition Counterdrug Operations

There is no doubt that international drug trafficking causes significant harm to the United States. Illicit drug use by more than a million U.S. citizens creates crime and other serious social and public health problems, and the huge illegal profits generated by illicit drug trafficking present a threat to the integrity of financial institutions and public officials. As bad as the drug problem may be for the U.S., it is infinitely worse for the nations where illicit drugs are produced, processed, and transported. The wealth and extreme violence of drug gangs have corrupted and intimidated public officials, distorted national economies, denied the governments of these nations effective control over their borders

and large areas of their territory, and in some cases provided direct support for armed rebellions.

A number of nations in the Caribbean and in Central and South America, which together supply much of the illicit drugs entering the U.S., have agreed to cooperate with the United States in coalition counterdrug operations. With U.S. support, they have carried out some very significant drug suppression operations, including crop eradication, destruction of processing facilities, interference with the supply of precursor chemicals, interruption of transportation networks, seizure of drugs, confiscation of funds, and arrest, prosecution, and punishment of offenders. The United States has provided funds, equipment, training, technical advice, transportation, and intelligence to the effort. Host nations rely on such support to carry out operations involving direct confrontation with suspected traffickers, such as arrest, search, and seizure. Our personnel are limited to a support role out of respect, in part, for host nation sovereignty, which traditionally carries with it a monopoly on the exercise of police and military power within its borders. The restrictions are also a product of a broader policy against involving U.S. military units in arrests and seizures, whether in foreign nations, on the high seas, or within U.S. territory.¹

For example, in a number of nations, U.S. military forces have provided and operated ground-based and aerial radar and communications interception facilities, the information from which has been supplied to the host nations. This information has been used to spot suspected drug trafficking flights and determine their routes and schedules, locate airfields, identify aircraft (sometimes leading to identification of their crew members and owners), force aircraft to land or to leave the nation's airspace, or execute an "end-game" in which host nation police or military forces have carried out raids on airfields and other facilities. In a statement to Congress on 10 March 1994, the Department of Defense "drug czar" said that a shift in counterdrug policy toward operations in the "source nations" would result in increasing this type of U.S. support to Colombia, Bolivia, and Peru, which were three source nations who had demonstrated the political will to combat narcotics trafficking.²

By early 1994, both Colombia and Peru had announced that they intended to shoot down suspected drug trafficking aircraft whose pilots ignored directions to land. On 1 May 1994, the United States stopped providing intelligence to Colombia and Peru concerning suspected drug trafficking flights. There were reports that the Departments of Defense and State vehemently disagreed on the wisdom of this action, but there appears to be no

dispute that the reason for this change in policy was centered on issues of domestic and international law.³

The Domestic Criminal Law Issue

The U.S. domestic law problem had its origin in the Montreal Convention, which was concluded 23 September 1971 as a measure to combat terrorism against civilian airliners. Each contracting State is obligated to either prosecute or extradite persons found in its territory who are accused of placing bombs on civil aircraft or of damaging or destroying such aircraft. Under the Montreal Convention, a State has jurisdiction to prosecute an offender (1) when the offense was committed in its territory, (2) when the offense was committed against or on board an aircraft registered in that State, (3) when the aircraft on board which the offense was committed lands in its territory with the alleged offender still on board, or (4) when the aircraft was leased to a lessee which has its permanent place of business in that State. The Convention requires each Contracting State to make certain offenses punishable under its domestic criminal law "by severe penalties."⁴

In satisfaction of this obligation, and acting partly in reaction to the August 1983 Soviet shoot-down of Korean Air Lines Flight 007 (KAL 007), Congress enacted the Aircraft Sabotage Act of 1984, which, *inter alia*, makes it a crime to damage or destroy a civil aircraft registered in a country other than the United States.⁵ Since 1956 it has been a violation of 18 U.S.C. § 32 to commit similar acts against aircraft registered or operated in the United States. The material provisions of the Aircraft Sabotage Act were codified at 18 U.S.C. § 32(b)(2).

After Peru and Colombia announced their shoot-down policies, officials in several agencies became concerned that 18 U.S.C. § 32(b)(2) might make military members and other government officials and employees subject to U.S. criminal prosecution if they supplied intelligence information or other assistance to a foreign government knowing that the government concerned intended to use it to shoot down civil aircraft. Ultimately, the Deputy Attorney General wrote to the Deputy National Security Adviser that it was "imperative" to cut off the supply of the radar information.⁶ The analysis underlying this position is stated in a 14 July 1994 memorandum from the Department of Justice's Office of Legal Counsel, the conclusions of which can be briefly summarized as follows:

(1) 18 U.S.C. § 32(b)(2) was intended by Congress to apply extraterritorially. This is clear from its language, from the prior existence of a separate statute that prohibited similar acts within the territory of the United

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States, and from the statute's purpose, which was to satisfy U.S. obligations under the Montreal Convention.

(2) The statute applies to government actors, including law enforcement officers and military personnel of foreign countries such as Colombia and Peru.

(3) U.S. Government personnel who supply intelligence to another government with reason to believe it will be used to commit violations of 18 U.S.C. § 32(b)(2) may be subject to prosecution as an aider or abettor under 18 U.S.C. § 2(a) or as a conspirator under 18 U.S.C. § 371.

(4) If a death results, the death penalty or life imprisonment may be authorized under 18 U.S.C. § 34.

(5) No exemption was provided in the statute for military members or other U.S. Government officers or employees, or for law enforcement, intelligence, or national security activities.⁷

This concern for the possible criminal liability of U.S. officials, including military members, seems to have been the primary motivation for the cutoff of radar generated information on 1 May 1994. The Governments of Peru and Colombia objected strongly,⁸ and the reaction of members of Congress was no less heated. The chairmen of the House Foreign Affairs Subcommittee on the Western Hemisphere and of the Subcommittee on International Security—both members of the President's party—denounced the Administration's position as "absurd."⁹ The Administration's effort to obtain passage of remedial legislation was greatly hampered by the strongly held opinion among many Congressmen that 18 U.S.C. § 32(b)(2) was never intended to apply to coalition counterdrug operations, and that Congress had more important things to do than to pass a remedial statute to satisfy the Administration's overcautious approach to the problem. In any event, however, Congress enacted Section 1012 of the National Defense Authorization Act for Fiscal Year 1995,¹⁰ which provided for a drug interdiction exemption once the President makes certain determinations. This provision is codified at 22 U.S.C. § 2291–4, which reads in part:

Official Immunity for authorized employees and agents of the United States and foreign countries engaged in interdiction of aircraft used in illicit drug trafficking

(a) Employees and agents of foreign countries

Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of a foreign country (including members of the

armed forces of that country) to interdict or attempt to interdict an aircraft in that country's territory or airspace if —

(1) that aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and

(2) the President of the United States, before the interdiction occurs, has determined with respect to that country that —

(A) interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and

(B) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force directed against the aircraft.

(b) Employees and agents of the United States

Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of the United States (including members of the Armed Forces of the United States) to provide assistance for the interdiction actions of foreign countries authorized under subsection (a) of this section. The provision of such assistance shall not give rise to any civil action seeking money damages or any other form of relief against the United States or its employees or agents (including members of the Armed Forces of the United States).

On 1 December 1994, the President signed Determination of President No. 95-7, "Resumption of U.S. Drug Interdiction Assistance to the Government of Colombia,"¹¹ in which he made the necessary determinations under the statute. On 8 December 1994, a similar determination was signed for Peru.¹² The United States promptly resumed providing radar information to Colombia and Peru, and it is reported that in 1995 Peru and Colombia seized or destroyed thirty-nine aircraft carrying drugs, driving drug traffickers to rely almost exclusively on land and water means of transport in those countries.¹³

This seems to be a happy ending, but fans of this legislative fix should take careful note of its two major limitations, both of which were clearly quite intentional. First, it does not apply to nations for which the necessary Presidential determinations have not been made. For example, in May 1995 the Mexican government announced that its military aircraft would be used to

“intercept” aircraft suspected of transporting cocaine through Mexican airspace.¹⁴ Both Mexican policy in this area and U.S. military support for Mexican counterdrug operations are in their formative phases, and only time will tell whether Presidential determinations will be sought for Mexico or other nations. The second major limitation is that the statutory exception applies only when the aircraft intercepted “is reasonably suspected to be primarily engaged in illicit drug trafficking.” If a host nation uses U.S. intelligence or other assistance to shoot down civil aircraft for any other purpose, such as enforcement of other criminal laws, no exception to the application of 18 U.S.C. § 32(b)(2) would appear to be available.

This entire episode demonstrates once again the Iron Law of Unintended Consequences, as a statute enacted for an indisputably worthy purpose turns out to have unfortunate and wholly unintended consequences when its plain language is applied in unforeseen circumstances.¹⁵

International Law Issues

The principal international law issue is the question of when—if ever—force can be used against civil aircraft. The Chicago Convention of 1944, which established the legal framework for international civil aviation, contains only one reference to the relationship between State aircraft and civil aircraft—Article 3(d) provides that the contracting States must operate their state aircraft with “due regard” for the safety of civil aircraft.¹⁶ There is strong support for the view that this provision is merely declarative of customary international law, but as with most invocations of customary international law, there have been sharp differences of opinion as to its practical application.

The positions taken by various nations in response to a number of post-World War II incidents in which scheduled airliners were fired upon indicate a majority view that there is an international legal obligation not to use force against civilian airliners in international service, but that this obligation is subject to the inherent right of self-defense recognized in Article 51 of the UN Charter. The right of self-defense, however, is strictly limited by the principles of necessity and proportionality, and every reasonable precaution must be exhausted in order to avoid the loss of life. These precautions include communicating with the aircrew to divert it away from sensitive areas, escorting it out of national airspace, requiring it to land, or—as a last resort—firing warning shots. When Bulgaria shot down an El Al airliner in 1955, Israel shot down a Libyan airliner over the Sinai in 1973, the Soviet Union crippled a Korean airliner in 1978, and the Soviet Union

destroyed KAL 007 in 1983, their actions were all roundly condemned. In each case, there appeared to be an international consensus that the actions taken were not justified as self-defense.¹⁷

The International Civil Aviation Organization (ICAO) was created by the Chicago Convention to serve as a policy forum for its member nations and as a mechanism to promote technical cooperation for the conduct of international civil aviation. After military aircraft of the Soviet Union shot down KAL 007 on 13 August 1983, killing its 269 passengers and crew, the resulting international outrage led to the unanimous adoption by the 152-member International Civil Aviation Organization of a new Article 3 *bis* to the Chicago Convention, intended to more specifically address the existence of an international legal obligation to refrain from using force against civil aircraft:

(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

(b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

(c) Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

(d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose

inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c) of this Article.¹⁸

The United States has not yet ratified Article 3 *bis*, and the number of ratifications is still well short of the 102 needed to bring it into effect. Nevertheless, there is strong support for the view that it is merely declarative of existing customary international law.¹⁹

There are two distinctly different views concerning whether or not the obligation stated in Article 3 *bis* to refrain from using weapons against civil aircraft in flight remains subject to a right of self-defense. One view—that the obligation not to use force is subject to no exception for self-defense—is expressed in various ICAO publications. ICAO regularly issues a number of publications that, while not legally binding in themselves, are some evidence of the member States' understanding of applicable international law. For example, there is an ICAO publication entitled *International Standards—Rules of the Air* (Annex 2 to the Convention on International Civil Aviation). This publication contains provisions adopted by the ICAO Council from time to time, acting in a “quasi-legislative function,” which creates an expectation that contracting States will comply within their territories with the standards approved by the Council unless they file a “difference” concerning particular rules.²⁰

Appendix 1 to the *Rules of the Air* provides standard visual signals for use when civil aircraft are intercepted by State aircraft. Appendix 2 contains the following provision, which was added as Amendment 27 to the *Rules of the Air* by vote of the ICAO Council on 10 March 1986:

1. Principles to be observed by States

1.1 To achieve the uniformity in regulations which is necessary for the safety of navigation of civil aircraft due regard shall be had by Contracting States to the following principles when developing regulations and administrative directives:

a) interception of civil aircraft will be undertaken only as a last resort;

b) if undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated airdrome;

c) practice interception of civil aircraft will not be undertaken;

d) navigational guidance and related information will be given to an intercepted aircraft by radiotelephony, whenever radio contact can be established, and

e) in the case where an intercepted civil aircraft is required to land in the territory overflown, the aerodrome designated for the landing is to be suitable for the safe landing of the aircraft type concerned.²¹

This provision has been controversial. The United States and a number of other members have stated that they consider this action by the ICAO Council to be *ultra vires*, in that Article 3(a) of the Chicago Convention states clearly that the Convention applies only to civil aircraft, and not to state aircraft. When the Council adopted the language, the U.S. informed the ICAO Secretary General that it disapproved of Amendment 27 on this basis. The majority view in the ICAO Council, however, was that the provision in Article 3(d), requiring member States to operate their state aircraft with “due regard” for the safety of civil aircraft, provided authority for the adoption of Amendment 27.²²

Other ICAO publications are prepared by the Secretariat and are only advisory in nature. Among these are a *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations*,²³ and a *Manual Concerning Interception of Civil Aircraft*.²⁴ The latter publication describes in considerable detail the circumstances in which interception may occur (including a suspicion that an aircraft is transporting illicit goods) as well as detailed discussions of radio signals, flight plans, publication of information about restricted areas, position reporting systems, radar identification, enhancement of visual markings, procedures to be followed when radio communications fail, procedures for interception, and related topics. A reminder is included that intercepted aircraft may not comply with the instructions given by ground controllers or by intercepting aircraft because of confusion, inability to interpret visual signals correctly, linguistic misunderstanding of radio messages, hypoxia, or because of inability to comply due to malfunction, hijacking, or inadequate fuel. Finally, advice is given as to the action to be taken by the intercepting pilot in the event of noncompliance:

4.1.2.16 In the event that an intercepted aircraft fails to respond to repeated attempts to convey instructions by visual signals or radiotelephony, the intercepting aircraft should continue to observe the intercepted aircraft until it lands or leaves the restricted or prohibited airspace. A full report on the incident should then be submitted to the appropriate authority to the State of registry for action (see 2.10, Article 3 *bis*).²⁵

Any mention of the possibility of firing a weapon at a nonresponsive aircraft is conspicuously absent from this publication. This is fully consistent with the published views of the former Director of the ICAO Legal Bureau, Dr. Michael Milde, who has written that an intercepting aircraft may use reasonable force to enforce compliance by an intercepted aircraft, but **not** if it involves the use of weapons against it.²⁶ One presumes this means that a display of force, including the firing of warning shots, forms the outer permissible limit of “reasonable force,” and that weapons fire directed at a noncomplying aircraft will always be deemed to exceed “reasonable force.”

A resolution adopted by the ICAO Council in response to the destruction by Cuba of two U.S.-registered civil aircraft on 24 February 1996 provides further support for the view that there is an absolute prohibition against firing weapons at civil aircraft. The relevant paragraphs are as follows:

THE COUNCIL

...

2. REAFFIRMS the principle that States must refrain from the use of weapons against civil aircraft in flight and that, when intercepting civil aircraft, the lives of persons on board and the safety of the aircraft must not be endangered;

...

4. REAFFIRMS its condemnation of the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, the rules of customary international law as codified in Article 3 *bis* of the Convention on International Civil Aviation, and the Standards and Recommended Practices set out in the Annexes to the Convention;²⁷

...

When they adopted this resolution, the members of the ICAO Council may have intended to reaffirm the view that the prohibition against using weapons against civil aircraft is not subject to any exception such as self-defense. On the other hand, they may have decided the issue of self-defense was not fairly raised by the facts of the incident, and therefore it need not be discussed. Cuba maintained that it had acted “in defense of its sovereignty,”²⁸ but it was clear that the previous acts of the Brothers to the Rescue in Cuban territory, the most egregious of which apparently consisted of dropping subversive leaflets, were not much of a threat to Cuban national security. Furthermore, there was

no evidence that the planes that were attacked by Cuba had, during that particular flight, engaged in such conduct, and they appear to have been outside of Cuban territorial airspace at the time of the attack.

The view that the obligation to refrain from using force against civil aircraft is subject to at least one exception—the inherent right of self-defense—is supported by the broad language of Article 51 of the United Nations Charter²⁹ and by the second sentence of paragraph (a) of Article 3 *bis*: “This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.” The sentence appears to have been added to the text expressly to make it clear that Article 51 applies. It is also interesting to read the various commentaries on the Soviet shootdown of KAL 007; none of them take the absolute position that there could never be a right to fire weapons in self-defense against a civil aircraft. Rather, they go to some lengths to demonstrate that there was no factual basis for any argument that the shoot-down was necessary, and that obvious alternatives that would have avoided innocent loss of life were not exhausted.³⁰

The U.S. statute authorizing assistance to countries who have adopted a shoot-down policy can be read as relying on the rationale of self-defense. This view is supported by the requirement that the President find, *inter alia*, that there is an “extraordinary threat posed by illicit drug trafficking to the national security of that country.” The international law doctrine of self-defense, however, does not provide a particularly good fit for the drug shoot-down problem, for the following reasons:

- *First*, there has been a long-standing controversy about whether the right to use force in self-defense can exist in the absence of an *armed attack*. This argument usually arises in connection with anticipatory or preemptive self-defense, but it clearly has considerable force when the issue is whether force can be used against aircraft that in most cases have not displayed or used armed force, and are not expected to do so.
- *Second*, while the drug problem as a whole may pose an extraordinary threat to the national security of a country, it will probably be hard to argue that any individual aircraft flight presents the sort of urgent danger that has traditionally been considered necessary to trigger the right to use force in self-defense.³¹
- *Third*, the offenders typically are not members of the armed forces of another nation, or even armed agents as envisaged in the term “state-sponsored terrorism.”³² While drug traffickers have cozy relationships with the governments of a number of nations, they are not generally operating as proxies for those governments in the execution of national policy. They are criminals, not actors, on the international political scene.

In fact, the law of international civil aviation, including Article 3 *bis*, will not apply at all to many shoot-down incidents when the traffickers are nationals of the nation shooting them down, when their aircraft are not registered in another nation, and when their flights do not cross national borders. International law regulates the conduct of nations in their dealings with one another and with each other's nationals, property, and corporations. With the limited exception of human rights law, international law does not attempt to regulate a nation's dealings with its own citizens. The negotiating history of Article 3 *bis* makes it quite clear that it is intended to apply only to "foreign aircraft" and not to aircraft of a state's own registration engaged in purely domestic traffic.³³ For such flights, the primary law to be applied is the nation's domestic law, including its law governing the permissible use of force against a fleeing suspected felon.³⁴ Where an aircraft does not display any registration number or flag and does not otherwise communicate any claim to be registered in another nation or to be engaged in an international flight, it would be hard to quarrel with a presumption by the local authorities that it is a domestic flight.

It is also clear that foreign civil aircraft are generally subject to the criminal law of any nation in whose territory they operate. The primary international law question is how domestic criminal law can be practically enforced against foreign aircraft.³⁵ The ultimate issue becomes whether Article 3 *bis* and customary international law prevent law enforcement authorities of a nation from using weapons against foreign aircraft in its territory even though such use of force is authorized under its domestic law.

A nation's interests in a law enforcement situation differ markedly from those involved in a border intrusion. When a nation is primarily concerned with ending an isolated unauthorized intrusion into its territorial airspace, that interest is served if the intruder departs. In a drug trafficking situation, the nation's interest in suppressing persistent drug trafficking is not served by simply escorting individual aircraft out of its territory, especially if that was the aircraft's intended destination. Reliance on enforcement actions by the aircraft's state of registry will in most cases be fruitless. The result may be that the nation concerned may have no practical enforcement option except to shoot down the suspected drug trafficker. It appears to this author that an attempt to apply Article 3 *bis* and customary international law in a manner that deprives nations of any practical remedy adequately serving their vital interests is doomed to failure.

The international community should also recognize that the use of force against civil aircraft involved in drug trafficking does not necessarily threaten the safety of legitimate civil aviation. Drug traffickers generally operate unregistered aircraft, or obscure any identifying markings. They typically file no

flight plans, refuse to communicate with ground controllers or intercepting aircraft, and disregard instructions to land at designated airfields. So long as the pilot of an innocent aircraft complies with ICAO standards in these areas, it will be perfectly safe from attack by a nation that follows procedures of the sort whose existence the President must certify under the U.S. statute. The greatest contribution of the statute may turn out to be that it requires both the U.S. and the nations it assists to focus on these precautions.

Accordingly, the most promising approach to understanding the international law issues raised by the use of weapons against drug trafficking aircraft appears to be a law enforcement perspective, rather than a self-defense analysis. If a nation's domestic law permits using force against a suspected drug trafficking aircraft that refuses to comply with instructions from an intercepting aircraft, and if it observes rigorous precautions against mistakenly attacking innocent aircraft, the use of force in these circumstances should be regarded as legitimate.

In support of this conclusion, one could argue further that the language of Article 3 *bis* to the effect that the phrase "This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations," not only preserves the right of nations to use force in self-defense, but that it also preserves their immunity from outside interference in "matters which are essentially within the domestic jurisdiction of any State" as guaranteed in Article 2 (7) of the Charter. The administration of criminal law within a nation's borders has traditionally been considered such a matter.

Additionally, there is very little likelihood that a nation adopting a policy of shooting down drug trafficking aircraft will be subject to serious criticism or sanctions from the international community. Drug traffickers have no vocal champions among the family of nations, and the interests of legitimate civil aviation will not be threatened as long as appropriate precautions are in place. In fact, there appears to be no record to date that any nation has protested the shoot-down policies adopted by Peru and Colombia, or the assistance provided to them by the United States. The only event likely to precipitate such a protest would be a ghastly mistake in which a planeload of innocents is blown out of the sky.

Whatever one may think of the urgency of solving the domestic law issues raised by the U.S. policy of assisting other nations which shoot down drug trafficking aircraft, they appear to have been solved by the

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1994 statute codified at 22 U.S.C. § 2291-4. The international law issues raised by a drug shoot-down policy are still unsettled, but such a policy should be accepted as a legitimate law-enforcement measure so long as rigorous precautions are in place to prevent the loss of innocent life.

Notes

1. See generally, Chapter 18 of Title 10 U.S.C.; Thomas S. M. Tudor & Mark E. Garrard, *The Military and the War on Drugs*, 37 AIR FORCE L. REV. 267 (1994).
2. DEFENSE ISSUES, vol. 9, no. 21 (1994) [Prepared statement of Brian E. Sheridan, Deputy Assistant Secretary of Defense for Drug Enforcement Policy and Support, to the House Appropriations Defense Subcommittee].
3. *Feud Hurts Bid to Stop Drug Flow*, WASH. POST, May 29, 1994, at 1; *U.S. Halts Flights in Andes Drug War Despite Protests*, N. Y. TIMES, June 4, 1994, at 1.
4. The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), September 23, 1971, 24 U.S.T. 564.
5. 18 U.S.C.A. § 32(b) (West Supp. 1996).
6. A.M. Rosenthal, *Saving the President*, N. Y. TIMES, June 17, 1994, at 31.
7. There was also discussion of possible civil liability for U.S. government agents, either in U.S. courts or in those of other nations. The remedial statute ultimately passed by Congress included immunity from civil suit. In addition, there was some concern expressed about whether the United States wanted to associate itself with law enforcement measures taken by other governments which would violate the U.S. Constitution when engaged in by U.S. law enforcement officials within the United States. For example, in *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court ruled that the use of deadly force to prevent a criminal suspect's escape was a violation of the Fourth Amendment unless the law enforcement officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. The U.S. Constitution clearly does not apply to the actions of another nation's officials within its own territory, but it raises a policy issue for U.S. officials which to this point has gotten relatively little attention.
8. Lawrence J. Speer, "Incoherent" U.S. Drug Policy Angers S. America, WASH. TIMES, June 23, 1994, at 15.
9. Thomas W. Lippman, *U.S. Refusal to Share Intelligence in Drug Fight is Called "Absurd,"* WASH. POST, August 4, 1994, at 12.
10. Pub. L. No. 103-337.
11. 59 Fed. Reg. 64,835 (1994).
12. Determination of President No. 95-9, *Resumption of U.S. Drug Interdiction Assistance to the Government of Peru*, 59 Fed. Reg. 65,231 (1994).
13. Chris Black, *South American Drug Route Targeted*, BOSTON GLOBE, June 26, 1996, at 11.
14. Tim Golden, *Mexico Plans Bigger Role for Military against Drugs*, N. Y. TIMES, May 23, 1995, at 3.
15. As another current example, several U.S. statutes threaten to create problems in the burgeoning field of information warfare. The U.S. criminal statutes prohibiting interception of or interference with communications, whose drafters carefully provided exemptions for criminal investigators and counterintelligence operatives to perform certain acts after authorization by a court or by specified intelligence officials, contain no exception for other national security activities. [See, e.g., 47 U.S.C.A. § 333 (West 1991) (Interference with

licensed radio communications); 50 U.S.C. § 1809 (West 1991) (Electronic surveillance of communications); Electronic Communications Privacy Act 18 U.S.C.A. § 2510–2522 (West 1970 & Supp. 1996).] Another example is 18 U.S.C. § 1367, which makes it a crime to interfere with the operation of a weather or communications satellite. Once again, an exemption is provided for “lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency or of an intelligence agency of the United States,” but a broader national security exception will be needed if U.S. policy makers ever decide to implement meaningful space control programs. Most readers could probably supply examples of their own.

16. Convention on International Civil Aviation, December 7, 1944, 59 Stat. 1693 [hereinafter Chicago Convention].

17. For an excellent discussion of post-WW II incidents in which civilian airliners were shot down by various nations, and the applicable legal principles, see Bernard E. Donahue, *Attacks on Foreign Civil Aircraft Trespassing in National Airspace*, 30 AIR FORCE L. REV. 49 (1989).

18. Protocol relating to an Amendment to the Convention on International Civil Aviation, 10 May 1984, ICAO Doc. 9436.

19. Ghislaine Richard, KAL 007: *The Legal Fallout*, IX ANN. OF AIR & SPACE L. 147 (1984); Michael Milde, *Interception of Civil Aircraft vs. Misuse of Civil Aviation*, XI ANN. OF AIR & SPACE L. 105, 113 (1986).

20. *Id.* at 105–106. Under Article 12 of the Chicago Convention, the standards approved by the Council are absolutely binding over the high seas.

21. Annex 2 to the Convention on International Civil Aviation, 9th ed., July 1990.

22. Milde, *supra* note 19, at 114–122.

23. ICAO Document 9554-AN/932, 1st ed., 1990.

24. ICAO Document 9433-AN/926, 2nd ed., 1990.

25. *Id.* at 4–5.

26. Milde, *supra* note 19, at 127.

27. ICAO LIBRARY BULLETIN, July 8, 1996.

28. John M. Goshko, *Cuban Aide Defends Air Attack*, WASH POST, February 29, 1996, at 16.

29. “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . .”

30. See Donahue, *supra*, note 17; Masukane Mukai, *The Use of Force against Civil Aircraft: The Legal Aspects of Joint International Actions*, XIX-II ANN. OF AIR & SPACE L. 567, 569 (1994).

31. For an excellent discussion of the international law of self-defense, see, Timothy Guiden, *Defending America’s Cambodian Incursion*, 11 ARIZ. J. INT. & COMP. L. 215 (1994).

32. For an excellent discussion of right to use force in response to state-sponsored terrorism, see, RICHARD J. ERICKSON, *LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM* (1989).

33. Milde, *supra* note 19.

34. It is beyond the scope of this article to pursue the question of what limitations on the use of force against fleeing felons—if any—are imposed by international human rights law.

35. Milde, *supra* note 19, at 123–124.



War Crimes

Howard S. Levie

THE BIBLE IS REplete WITH EXAMPLES of what today we would consider to be war crimes against humanity, but which in Biblical days were common and accepted acts of war. Many statements similar to the following will be found in the Bible:

Thus we put to death all the men, women, and dependents in every city, as we did to Sihon King of Heshbon. All the cattle and spoil from the cities we took as booty for ourselves.¹

You shall put all its males to the sword, but you may take the women, the dependents, and the cattle for yourselves, and plunder everything else in the city.²

That such actions were typical of the time demonstrates the distance that constraints on war have traveled over the past two millenia.

Probably one of the earliest war crimes trials of which we have knowledge is the so-called "Breisach Trial," the trial of Peter von Hagenbach by a multinational tribunal in 1474. An area of the Upper Rhine, including the town of Breisach, was pledged to the Duke of Burgundy by the Archduke of Austria to guarantee a debt. As the Military Governor appointed by the Duke

of Burgundy, von Hagenbach instituted a brutal policy that included “murder, rape, illegal taxation and wanton confiscation of private property” against the citizens of Breisach and of the surrounding area. Eventually, von Hagenbach was seized by revolting German mercenaries and the citizens of Breisach and tried by a tribunal consisting of twenty-eight judges, eight from Breisach and two from each of the other Alsatian, German, and Swiss towns affected. His defense was “superior orders”—that he was merely complying with the orders of his master, the Duke of Burgundy. He was found guilty, deprived of his knighthood, and executed. Although his acts had been committed before the actual outbreak of war, the occupation of Breisach resembled a wartime occupation, and his offenses would now be considered to have been war crimes.³

There were, undoubtedly, war crimes trials conducted in the succeeding centuries,⁴ but we find little documentation in that regard. However, in *De Jure Belli Ac Pacis Libri Tres*, published in 1625, Hugo Grotius said:

The fact must be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishment not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.⁵

In effect, Grotius was saying that any sovereign had the right to try violators of the law of war even though neither he nor his subjects were the victims of the illegal act—the doctrine of universal jurisdiction over war crimes.⁶

During the American Civil War (1861-1865), the so-called Lieber Code, issued by the Union Army in 1863 as General Orders No. 100, contained the following provision:

59. A prisoner of war remains answerable for his crimes committed against the captor’s army or people, committed before he was captured, and for which he has not been punished by his own authorities.⁷

After the war’s end, the Federal authorities tried a number of former Confederates for war crimes committed during the hostilities.⁸

Several decades later, during the Philippines “pacification” program that followed the Spanish-American War (1898), war crimes were committed by both sides. The United States Army tried not only guerrillas who had violated the law of war,⁹ but also members of its own Army who had done likewise.¹⁰

In and after the Boer War (1899-1902), the British army tried several war crimes cases, cases involving both its own personnel and personnel of the enemy. The 1902 Treaty of Vereeniging, which ended that conflict, provided:

IV. No proceedings, civil or criminal, will be taken against any of the burghers so surrendering or so returning for any acts in connection with the prosecution of the war. *The benefits of this clause will not extend to certain acts contrary to the usage of war which have been notified by the Commander-in-Chief to the Boer generals and which shall be tried by court-martial immediately after the close of hostilities.*¹¹

While hostilities were ongoing, the British tried three Australian officers of its army for war crimes; after the war, a Boer who had misused a white flag was tried.

During World War I (1914-1918), violations of the law of war, war crimes, were committed and trials were conducted by both sides. One case which caused a furor in Great Britain was the trial, conviction, and execution by Germany of Charles Fryatt, captain of the British merchant vessel S.S. *Brussels*. At the outbreak of the war the British Admiralty had instructed all merchant captains that if approached by a German submarine on the surface, they were to try to ram it. This happened to Captain Fryatt, who saved his ship by attempting to ram the submarine which was then forced to depart. A year later the *Brussels* was captured by German surface vessels. Captain Fryatt was tried as having been an illegal combatant. His defense was that he had obeyed the order of his government. He was convicted and executed. At the time, the British termed this "judicial murder." As we shall see, the decision of the German court is now accepted international law.

One article of the Treaty of Versailles, which ended World War I, provided for the trial of the ex-Kaiser of Germany by an international court "for a supreme offense against international morality and the sanctity of treaties."¹² Today, we would probably designate that offense as falling within the term "Crimes against Peace." He was never tried because he had sought and obtained asylum in The Netherlands, which refused to extradite him despite demands by both France and the United Kingdom. The Treaty also provided for the surrender, to the former Allies for trial, of individuals alleged to have committed war crimes during the course of the hostilities. For political reasons, the Allies eventually agreed that such trials should be conducted by the Supreme Court of Leipzig.¹³ After a dozen cases had been tried at the behest of Belgium, France, and the United Kingdom, most of which resulted in either unwarranted acquittals or grossly inadequate sentences, the Allies ceased sending cases to the German court. This experience demonstrated that the

trial by enemy courts of war crimes allegedly committed by members of the enemy armed forces or civilian population against members of the armed forces, civilian population, or property of the victors was not a viable solution to the problem, and that more just results could be obtained in the courts of the victors.¹⁴

There were, however, two cases tried by the Supreme Court of Leipzig which are worthy of mention. Believing that the British were using their hospital ships, normally exempt from attack, for military purposes, the German Admiralty announced that such vessels must follow certain prescribed routes; if they were found in a barred route, they would be subject to attack. Finding the British hospital ship *Dover Castle* outside the prescribed routes, a German submarine sank it without warning. When the submarine commander was tried by the Supreme Court of Leipzig, his defense was that he had complied with the orders of his Government and his superiors. Despite the decision in the *Fryatt Case*, which had held that compliance with an order of one's government was no defense, he was acquitted.¹⁵

The second case of interest also involved a British hospital ship, the *Llandoverly Castle*. While sailing across the Atlantic from Canada to Great Britain, it was sighted by a German submarine. For some unknown reason, the German submarine commander decided that it was carrying American aviators and torpedoed it. When survivors in life boats were interrogated, it became clear that the only persons who had been aboard were Canadian medical personnel and the crew. In order to cover up his crime, the German captain and two of his officers proceeded to machine-gun the lifeboats. One lifeboat escaped destruction and so the incident became known. At the end of the war, the captain disappeared, but his two officers were brought to trial. Their defense was "superior orders." In this case, the Court held that while compliance with the orders of a superior was normally a good defense, that was not so where, as here, "the order is universally known to everybody, including the accused, to be without any doubt whatever against the law." The accused were found to be guilty of a war crime.¹⁶

In 1928, the "Pact of Paris," also known as the "Kellogg-Briand Pact" after its progenitors, and technically known as the International Treaty for the Renunciation of War as an Instrument of National Policy, was drafted. It was accepted by forty-four States, including all of the then-major Powers except the Soviet Union. This Pact provided:

Article 1. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of

international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise between them, shall never be sought except by pacific means.¹⁷

During the course of World War II numerous statements were made by the members of the Allied Powers to the effect that upon the conclusion of hostilities there would be trials of those who had violated the law of war, including those who were responsible for the initiation of the war. Then, on 13 January 1942, nine of the countries at war with Germany signed the Declaration of St. James.¹⁸ The relevant provisions of that Declaration stated the signatories:

Recalling that international law, and in particular the Convention signed at The Hague in 1907 regarding the laws and customs of land warfare, does not permit belligerents in occupied countries to commit acts of violence against civilians, to disregard the laws in force, or to overthrow national institutions,

(1) affirm that acts of violence thus inflicted on the civilian populations have nothing in common with the conception of an act of war or a political crime as understood by civilised nations,

...

(3) place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them.¹⁹

In addition, numerous official pronouncements to the same general effect were made by individual countries and by the Heads of State.²⁰ On 20 October 1943, a conference at the British Foreign Office resulted in the establishment of the United Nations Commission for the Investigation of War Crimes (this title was later changed to the United Nations War Crimes Commission); with the exception of the Soviet Union, all of the European Allies, and China were represented.²¹

Germany surrendered in May 1945, but even before then discussions had been entered into concerning the manner in which the punishment of the European war criminals was to be accomplished. From the beginning, the United States favored trials for all alleged war criminals, including the leaders.

The Soviet Union also favored a judicial solution to the problem. The United Kingdom originally favored a political solution for the leaders, citing the difficulties of a trial by an international court, but ultimately agreed to a trial. At the Yalta Conference in February 1945, the decision was made that there would be a trial. The following May, at the organizing meeting for the United Nations in San Francisco, the United States circulated a draft proposal for such a trial to the representatives of the Provisional Government of France, the Soviet Union, and the United Kingdom. Supreme Court Associate Justice Robert Jackson was named as Chief Counsel for the United States by President Truman and immediately began conferring with all concerned. On 25 June 1945 a conference of the four major Powers opened in London. They signed an Agreement to which was attached a Charter of the International Military Tribunal (IMT) on 8 August 1945.²² Justice Jackson had offered Nuremberg, in the American Zone of Occupation, as a suitable place for the trial and this offer was accepted.²³

The Charter of the International Military Tribunal listed the offenses within its jurisdiction, some of which were later alleged to be *ex post facto*. The offenses listed were: (1) crimes against peace; (2) war crimes; (3) crimes against humanity; (4) conspiracy to commit any of the foregoing; and (5) membership by the accused in an organization determined to be criminal. There was no provision for appeal, the decision of the Tribunal being final.

Two other provisions of the Charter of the IMT are worthy of mention. First, contrary to prior general custom, but in accordance with the provision of the Treaty of Versailles for the trial of the ex-Kaiser, the Charter provided:

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Second, following the decision of the German court in the case of Captain Charles Fryatt, the Charter provided:

Article 8. The fact that the Defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.²⁴

The International Military Tribunal consisted of one judge and one alternate from each of the four countries. With each State participant having a Chief Counsel of equal rank, the prosecution could only act by agreement. After some difficulties, twenty-four individuals were indicted²⁵ and, on 18

October 1945, arraigned in Berlin. The trial itself took place at Nuremberg from 30 November 1945 to 31 August 1946, with judgment delivered on 1 November 1946. Twelve accused received death sentences; three received sentences to imprisonment for life; four received sentences to imprisonment for specified terms; and three were acquitted.²⁶ The decision of the Tribunal was unanimous except that the Soviet judge dissented from the acquittals, the failure to adjudge the death sentence against Rudolph Hess, and the findings that several organizations were not criminal in nature.²⁷

It was argued that “crimes against peace” had not been an international offense and that, therefore, it was improper to charge the accused with this offense. The Tribunal found that, in view of the Kellogg-Briand Pact, the making of aggressive war was a war crime which had existed before the outbreak of World War II and that the accused could, therefore, be guilty of the offense of having committed a crime against peace.²⁸

When the Tribunal found that several of the Nazi organizations, such as the SS, the SD, and the Gestapo, were criminal in nature, that meant that every member of that organization was guilty of a war crime unless he could prove that he had not known of its criminal nature when he joined it and that he personally had never participated in its criminal activities. Inasmuch as the membership in these organizations numbered in the tens of thousands, the task of trying them was obviously beyond the resources of the Allied Powers. Accordingly, this chore was turned over to the German courts, which tried many thousands of these cases.²⁹

The trial by the International Military Tribunal was only the tip of the iceberg. The Allied Control Council, the central authority for the four zones of occupation, enacted a law intended to bring some uniformity into the war crimes prosecution programs of the four zones of occupation of Germany. The Military Governor of the United States Zone of Occupation promulgated an implementing law. Under this law, the United States tried twelve cases, known colloquially as the “Subsequent Proceedings,” involving 185 high-ranking government, military, and industrial personnel (of whom 35 were acquitted and 24 received death sentences);³⁰ and, under general international law, United States military commissions sitting in Dachau (a former Nazi concentration camp) tried 1,062 accused (of whom 256 were acquitted and 426 received death sentences).³¹ The last two World War II war crimes trials conducted in Europe were both tried in French courts. In 1987, Klaus Barbie, who had been the head of the Gestapo in Lyons during the war and who was responsible for many deportations of Jews and executions, was deported from

Bolivia where he had taken refuge and where a previous government had denied extradition. He was convicted of crimes against humanity and sentenced to imprisonment for life. (He died in prison in 1991.) Then, in 1994, Paul Touvier, a Frenchman who had headed a branch of the Milice, the French police organization which supported (and sometimes outdid!) the Nazi Gestapo, and who had remained hidden in France for all those years, was tried for the execution of seven Jews in retaliation for the assassination of Philippe Henriot, a rabid pro-Nazi Frenchman. (It was not alleged that the Jewish victims had any connection with the assassination.) Touvier was found guilty of a crime against humanity and sentenced to life imprisonment.

Meanwhile, somewhat similar war crimes trials programs were being conducted in the Far East. An International Military Tribunal for the Far East had been established by a proclamation issued by General Douglas MacArthur, the Supreme Commander for the Allied Powers. Its Charter was very much similar to that of the International Military Tribunal except that it consisted of eleven judges (one from each of the countries which had signed the Japanese surrender agreement and one each from India and the Philippines), and General MacArthur retained a right of review. Moreover, there was only one chief prosecutor (an American) and an assistant prosecutor from each of the other participating countries. The main question was whether the Emperor would be named as an accused. It was finally decided that he would not be among the accused, primarily because such action would have made the occupation so much more difficult because of the regard in which he was held by the Japanese people. There were originally twenty-eight accused, but two died during the trial and one was found to be incompetent to stand trial. The accused were arraigned in Tokyo on 3-4 May 1946, and the trial proper ran from 3 June 1946 until 16 April 1948. The reading of the judgment did not begin until 4 November 1948 and ended on 12 November. In addition to the judgment of the Tribunal, there was one separate opinion, one concurring opinion, and three dissenting opinions. There were seven death sentences,³² sixteen sentences to imprisonment for life, one to imprisonment for twenty years, and one to imprisonment for seven years.³³

Here, too, there was a multitude of trials by military commissions. The United States tried cases in Manila, Yokohama, Kwajalein, Guam, and China. Additionally, the United Kingdom, France, China, Australia, the Netherlands East India, and the Soviet Union all tried war crimes cases in the Far East.³⁴

As would be expected, in addition to the claim of *ex post facto*, there were a number of legal problems presented in the prosecution of all of these war crimes. Probably the provision which caused the most dispute was that relating

to the receipt of evidence. Article 19 of the Charter of the International Military Tribunal stated:

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value.

The charters for the other Tribunals and military commissions all had identical or similar provisions. American lawyers, accustomed to the stringent technical rules of evidence applicable in the common law system, often argued that this was unfair to the accused. They overlooked the facts that civil law countries, which do not have these technical rules of evidence, were equally involved and that the circumstances of war crimes trials are such that victims and witnesses may be thousands of miles away in their home countries by the time of trial. Accordingly, the full application of the common law rules of evidence would have made many trials impossible. In order to ensure fairness, the Tribunal adopted the rule that affidavits would be admissible, but that the opposing party could challenge the affidavit and demand the production of the affiant as a live witness. Strange to relate, in the only statistics available on the subject, in the first seven trials of the "Subsequent Proceedings," the prosecution offered 291 affidavits while the defense offered 3,098. The prosecution challenged 40 of the defense affidavits while the defense challenged 84 of the prosecution affidavits (64 of the latter challenges were in one case!).³⁵

When the Secretary-General of the United Nations drafted a proposed Statute for an International Tribunal for the Prosecution of Persons for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, a Statute that was approved without change by the Security Council, Article 15 thereof provided that the Judges of the Tribunal could adopt rules for the admission of evidence.³⁶ The Judges of the International Tribunal adopted Rule 89(C), which provides that "A Chamber may admit any relevant evidence which it deems to have probative value;" and Rule 89(D) which provides that "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."³⁷

The fact that the action charged as a war crime had been performed pursuant to the order of a superior was advanced in almost every case. Frequently the evidence established the validity of the claim. Under Article 8 of the Charter, quoted above, and its equivalent in other war crimes laws and regulations, this was not a defense. However, in such cases where the accused

was found to be guilty, his sentence would frequently be considerably mitigated.

When the International Law Commission formulated the principles of the Charter and judgment of the IMT, its Principles 3 and 4 paralleled Articles 7 and 8 of the Charter. Nevertheless, in every case where the denial of the defense of “superior orders” has been proposed for inclusion in law of war conventions drafted since World War II, the proposal has been rejected.³⁸ However, the Secretary-General did include such a provision denying the “defense” in the Statutes he prepared for the International Tribunals for the Former Yugoslavia and for Rwanda, and the Security Council retained them.³⁹ Similarly, the Code of Conduct on Politico-Military Aspects of Security, adopted by the Conference on Security and Cooperation in Europe, includes the following provisions:

30. Each participating State will instruct its armed forces personnel in international humanitarian law, rules, conventions and commitments governing armed conflict and will ensure that such personnel are aware that *they are individually accountable under national and international law for their actions.*

31. The participating States will ensure that armed forces personnel vested with command authority exercise it in accordance with relevant national as well as international law and are made aware that they can be held individually accountable under those laws for the unlawful exercise of such authority and that orders contrary to national and international law must not be given. *The responsibility of superiors does not exempt subordinates from any of their individual responsibilities.*⁴⁰

The responsibility of the commander for the issuance of illegal orders and for violations of the law of war by his subordinates has also been a major problem. This question arose early in the war crimes program after World War II when Japanese General Tomoyuki Yamashita was tried in Manila in October 1945, charged with the responsibility for innumerable violations of the law of war committed by his troops during the battles for the recovery of the Philippine Islands by the United States. His defense was that he took no action to terminate these war crimes and punish the offenders, because he was unaware of the fact that they were being committed. What the military commission which tried him, and the boards and courts which reviewed the case on appeal, held was, in effect, that when a commander *knew, or should have known*, that troops under his command were committing war crimes, he had a duty to end such actions and to punish the perpetrators.⁴¹

The responsibilities of the commander for violations of the 1949 Geneva Convention⁴² and of the 1977 Additional Protocol I⁴³ are now set forth in Articles 86(2) and 87 of the latter. They provide:

Article 86. Failure to act

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87. Duty of Commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and the Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

The International Tribunal for the Former Yugoslavia, mentioned above, was the first tribunal for the trial of war crimes not established by the victor or victors. Its judges are elected by the United Nations. Composed of two Trial Chambers of three judges each and an Appeals Chamber of five judges, it is the first war crimes court in which there is a right of appeal. In the *Tadic Case*, the accused challenged the jurisdiction of the Tribunal, but the Appeals Chamber determined that it was properly established and did have jurisdiction to try cases involving violations of the law of war which had occurred in the former

Yugoslavia. At the time of this writing, although the International Tribunal for the Former Yugoslavia has now been in existence for four years, it has tried only two cases. In the *Erdemovic Case* there was a guilty plea. (The defendant has filed an appeal based on the ground that his ten-year sentence is too severe!) In 1997, the Appeals Chamber decided the *Tadic Case* on the merits, convicting the accused.

In 1994 the United Nations Security Council adopted Resolution 955 establishing a similar Tribunal to try genocide and other war crimes committed in Rwanda or in neighboring States by Rwandan citizens. The Statute for this Tribunal is identical, *mutatis mutandis*, to that of the Tribunal for the Former Yugoslavia. The Appeals Chamber already established will function for both Tribunals.

For many years the International Law Commission has been charged with the task of drafting a Statute for an International Criminal Court. In a Draft Statute prepared in 1993, the jurisdiction of the Court included, among others, the crimes of genocide and grave breaches of the four 1949 Geneva Conventions and 1977 Additional Protocol I.⁴⁴ It would also have jurisdiction over crimes of aggression where the Security Council of the United Nations "has first determined that the State concerned has committed the act of aggression which is the subject of the charge."⁴⁵ The Draft Statute is still in an embryonic stage. It was the subject of the work of a preparatory committee and, unless there are developments to the contrary, a diplomatic conference will be convened in 1998 to draft a convention establishing an international criminal court.⁴⁶

The most recent action of the United States in this area occurred on 21 August 1996 when the President approved the "War Crimes Act of 1996."⁴⁷ It provides:

§2401. War crimes

(a) OFFENSE. Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) CIRCUMSTANCES. The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such breach is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) DEFINITIONS. As used in this section, the term “grave breach of the Geneva Conventions” means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party.

Heretofore, when a nation tried one of its own personnel for a violation of the law of war such as a grave breach of one of the 1949 Geneva Conventions, as in the *Calley Case*, it has not been considered to be a war crimes case, although, in fact, that was what it was. Insofar as the United States is concerned, such a trial will, in the future, unquestionably be a war crimes case. Apparently, Congress did not consider it necessary to include the commission of such offenses by non-nationals of the United States, whether committed against American or foreign personnel. There can be no doubt that they are already war crimes within the jurisdiction of the United States.

On 19 October 1996, the President approved an Act which includes the following provision:

§ 2. Sense of The Congress.

It is the sense of the Congress that United States Government agencies in possession of records about individuals who are alleged to have committed Nazi war crimes should make these records public.⁴⁸

This Act was considered necessary because of the overly strict construction that many government agencies are following in application of the Freedom of Information Act.

The laws against war crimes, like all penal laws, have two purposes: 1) to discourage their commission; and 2) to punish offenders. During the past half-century the international community has failed in both of these areas. The rare possibility of trial after the termination of hostilities does not greatly discourage the commission of further offenses during the course of hostilities; the complete failure to punish individuals for the commission of war crimes even after the termination of hostilities certainly does not discourage their commission in the next conflict that occurs.⁴⁹ It remains to be seen whether the action of the Security Council of the United Nations in the Former Yugoslavia and in Rwanda, and the possible creation of an International Criminal Court, will have any lasting effect.⁵⁰

Notes

1. *Deuteronomy* 4:6-7.
2. *Id.* at 20:14. See also *Numbers* 31:7-12; 1 *Samuel* 15:3; etc. For similar as well as contrary rules in other civilizations, see the Introduction to 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 3 (Leon Friedman ed., 1972).
3. 2 GEORG SCHWARZENBERGER, *INTERNATIONAL LAW (ARMED CONFLICT)* 462-466 (1968).
4. The same author lists several events which might be considered to be war crimes trials in earlier years in Georg Schwarzenberger, *The Judgment of Nuremberg*, 21 *TUL. L. REV.* 329 (1947).
5. Vol. II (Classics of International Law, Francis W. Kelsey trans., 1984), at 504.
6. The Treaty of Westphalia, 1 Consol. T.S. 319, 1 *MAJOR PEACE TREATIES OF MODERN HISTORY*, 1648-1967, at 7 (Fred L. Israel ed., 1967), which ended the Thirty Years' War in 1648, included the following provision:

II

That there shall be on the one side and the other a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles, in what place, or what manner soever the Hostilitys have been practis'd, in such a manner, that nobody, under any pretext whatsoever, shall practice any Acts of Hostility, entertain any Enmity, or cause any trouble to each other; . . . That they shall not act, or permit to be acted, any wrong or injury to any whatsoever; but that all that has pass'd on the one side, and the other, as well before as during the War, in Words, Writings, and Outrageous Actions, in Violences, Hostilitys, Damages and Expences, without any respect to Persons or Things, shall be entirely abolished in such a manner that all that might be demanded of, or pretended to, by each other on that behalf, shall be bury'd in eternal Oblivion.

This certainly appears to be a recognition and waiver by both sides of the violations of the law of war committed by the other.

7. *THE LAWS OF ARMED CONFLICT* 3, 12 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988)
8. *United States v. Henry Wirz*, 8 *Amer. St. Trials* 657 (1918) (Wirz was charged with maltreatment of Union prisoners of war in the Andersonville, Georgia, prisoner-of-war camp. He was convicted and executed); *U.S. v. James W. Duncan*, *MILITARY LAW AND PRECEDENTS* 791-792 (William Winthrop ed., 1886; 2d ed. 1920) (Duncan was one of Wirz's civilian assistants. He was convicted and sentenced to imprisonment for fifteen years); *U.S. v. Major John H. Gee*, *id.* at 792 n. 28 (He was tried for the maltreatment of Union prisoners of war at another Confederate prisoner-of-war camp. He was acquitted); *United States v. T.E. Hogg et al.*, 8 *RECORDS OF THE REBELLION*, Series II, 674 (Several members of the Confederate armed forces boarded an American merchant vessel in civilian clothes with the intention of taking it over and using it as a Confederate commerce raider. They were convicted and sentenced to death, but their sentences were commuted to imprisonment); etc.
9. *U.S. v. Braganza et al.*, cited in Willard Cowles, *Universality of Jurisdiction over War Crimes*, 33 *CAL. L. REV.* 177, 211 (1945); *U.S. v. Versosa et al.*, *id.* at 210; etc.

10. U.S. v. Brig. Gen. Jacob A. Smith, *reprinted in* Friedman, *supra* note 2, at 799; U.S. v. Major Edwin F. Glenn, *reprinted in id.* at 814; United States v. Lt. Preston Brown, *reprinted in id.* at 820; etc.

11. 2 Israel, *supra* note 6, at 1145, 1146 (emphasis added).

12. 2 T.I.A.S., at 43, 136 (Charles Bevans ed., 1969); 13 AM. J. INT'L L. (Supp.) 151 (1919).

13. The Allies had originally submitted a list of about 890 names of individuals wanted for trial, including the Crown Prince, General von Hindenburg, Admiral von Tirpitz, and many other former leaders of Germany. The list submitted to the Supreme Court of Leipzig contained only 45 names.

14. One of the most vehement opponents of this conclusion was himself *tried and acquitted* in the so-called I.G. Farben Case (U.S. v. Carl Krauch). See VON KNIERIEM, THE NUREMBERG TRIALS (1959). The fairness of the trial was rarely an issue raised by the accused. The one case in which this might be said to have become a major issue was *In re Yamashita*, 327 U.S. 1 (1946), discussed below.

15. 16 AM. J. INT'L L. 704 (1922), 2 ANN. DIG. 429 (1922). This decision was probably based upon a finding that, under the circumstances, the order of the German Admiralty was a legal order.

16. 16 AM. J. INT'L L. 708 (1922); 2 ANN. DIG. 436 (1922).

17. 46 Stat. 2343, 94 L.N.T.S. 57, 22 AM. J. INT'L L. (Supp.) 171 (1928), 128 B.F.S.P. 447.

18. The group which initiated this action was then known as the Inter-Allied Conference on the Punishment of War Crimes. The name was later changed to the Inter-Allied Commission on the Punishment of War Crimes.

19. It is reproduced in THE HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 90 (1948).

20. The most important of these Declarations was probably that made at Moscow by Prime Minister Churchill, President Roosevelt, and Marshal Stalin in November 1943. *Id.* at 107.

21. The Soviet Union was not represented because it had demanded that seven of its constituent Republics, which were actively engaged in the war, each be represented, a demand which had not been met. *Id.* at 112. The United Nations War Crimes Commission functioned until 1948, receiving trial records from its member nations, many of which were published with a discussion of the applicable law in a 15-volume set of books, UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (1947-49).

22. Nineteen other nations subsequently adhered to the London Agreement.

23. The history of the negotiations that culminated in the 1945 London Agreement and the Charter of the International Military Tribunal is recorded in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, Department of State Publication 3080 (1949).

24. 59 Stat. 1544, 82 U.N.T.S. 279, 3 Bevans 1240. The comparable provisions of the Charter of the International Military Tribunal for the Far East state:

Article 7. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime for which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

T.I.A.S. 1589, 4 Bevans 27. It will be noted that here, unlike the London Charter, the fact that the accused complied with an order of his Government may be considered in mitigation of punishment.

25. One accused was found to be incompetent, another committed suicide, and a third, Martin Bormann, was tried *in absentia*, so there were actually twenty-one accused present in Court. (Although Bormann was not present in Court, he was represented by defense counsel.)

26. The three who were acquitted soon found themselves facing German courts, where all three were convicted of having violated German law!

27. One accused, Hermann Goering, committed suicide before he could be hung. He and those who were executed were all cremated and their ashes spread to the winds. With the exception of Hess, the others, including those with life sentences, either died or were released prior to the expiration of their sentences. The Soviet Union refused to agree to Hess' release. When he died (or committed suicide) in 1987, he was the only major war criminal still imprisoned in Spandau Prison in Berlin.

28. After years of debate in the League of Nations and in the United Nations, in 1974 the General Assembly of the United Nations adopted a resolution in which one paragraph specifically provides that "A war of aggression is a crime against international law." G.A. Res. 3314 (XXIX), Dec. 14, 1974, 13 I.L.M. 710, 714 (1974).

29. The Allied authorities considered that by assigning the task to the German courts, they would determine the extent of their de-Nazification. Since these cases were, for the most part, trials of Germans for offenses committed against other Germans, they were not then considered to be war crimes trials.

30. Each of these twelve trials was conducted by three American judges, usually borrowed from state courts. The I.G. Farben Case, referred to *supra*, in note 14 was Case No. 6 of these cases.

31. The great majority of these cases fell into three categories: lynching of downed Allied airmen, concentration camp personnel, and acts of euthanasia. During this period, the British tried 1,085 accused in their zone, of whom 348 were acquitted and 240 received the death sentence; France tried 2,107 accused, of whom 404 were acquitted and 104 received death sentences; and the Soviet Union tried 14,240 accused of whom 142 were acquitted and 138 received death sentences. (The statistics provided by the Soviet Union are not generally accepted. There were 66 death sentences in just 9 cases recorded by the United Nations War Crimes Commission. United Nations Archives, UNWCC, Reel 36.)

32. Unlike the procedure followed in Germany, the ashes of the individuals who were sentenced to death were preserved and are now buried in what is considered to be a shrine!

33. The individual who received the seven year sentence was Maroru Shigemitsu. Like the others, he received an early release from confinement and four years later he was the Foreign Minister of Japan!

34. Strange to relate, although the Soviet Union was in the war for less than a week, it tried several thousand war crimes cases and still held Japanese as war crimes prisoners in 1955, long after all the other countries had caused the release of their prisoners.

35. HOWARD LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 260 n.131 (1994).

36. U.N.Doc. S/25704, May 1, 1993, 32 I.L.M. 1192, 1196 (1993).

37. U.N. Doc. IT/32, March 14, 1994, 33 I.L.M. 484, 533 (1994).

38. See Howard Levie, *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders*, 30 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 184 (1991), reprinted in *LEVIE ON THE LAW OF WAR* (Michael N. Schmitt & Leslie C. Green eds., 1998) [forthcoming]. Many nations have provisions in their civil penal law that make compliance with

the orders of a superior a defense. This is probably a major reason for their objection to denying it to the military. Moreover, the national representatives at Diplomatic Conferences probably fear, with reason, that military discipline would be adversely affected, as it might cause a subordinate to refuse to obey an order that is legitimate but which the subordinate *believes* to be illegal.

39. The provisions of the Statute for the International Tribunal for the Former Yugoslavia frequently follow the London Charter. Thus, its Article 7 states:

Article 7: Individual Criminal Responsibilities

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that anyone of the acts referred to in articles 2 to 5 of the present statute were committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment, if the International Tribunal determines that justice so requires.

40. 12 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 7, 11 (Howard Levie ed., 1997).

41. This case ultimately reached the United States Supreme Court which, in *In re Yamashita*, 327 U.S. 1 (1946), sustained the conviction by a vote of six to two.

42. 1949 Geneva Conventions relative to the Protection of Victims of War, 6 U.S.T. 3114/3217/3316/3516, T.I.A.S. Nos. 3362/3363/3364/3365, 75 U.N.T.S. 31/85/135/287, 157 B.F.S.P. 234/262/284/355.

43. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 72 AM. J. INT'L L. 457 (1978); 16 I.L.M. 1391 (1977). To date the United States has not ratified this Protocol.

44. U.N. GAOR, 48th Sess., Supp. No. 10 (A48/10), at 255 (1993), 33 I.L.M. 253 (1994) (art. 22, at 264; art. 23, at 268; and art. 26 at 268). The Commission has also long engaged in the task of preparing a Draft Code of Crimes Against the Peace and Security of Mankind. Article 20 of the 1996 draft, entitled "War Crimes," is quite complete in its coverage of both customary and conventional war crimes. U.N. GAOR, 51st Sess., Supp. No. 19, U.N.Doc. A/51/10 (1996); 91 AM. J. INT'L L. 365, 369 (1997).

45. Art. 27, 33 I.L.M. 270 (1994). The overall provisions proposed for jurisdiction are far from satisfactory.

46. G.A. Res. 51/207, Dec. 17, 1996, 36 I.L.M. 510 (1997). Much as he favors the establishment of such a Court, the present writer is not optimistic that States, particularly the United States, will ratify such a Convention.

47. Pub. L. No. 104-192, 110 Stat. 2104, 18 U.S.C. 2401.

48. Pub. L. No. 104-309, 110 Stat. 3815.

49. The United Nations Command was prepared to try about 200 individuals for war crimes committed during the Korean War (1950-1953). No trials took place because of the provisions of the Armistice Agreement requiring the repatriation of any prisoner of war who so desired. During the conflict in Vietnam, the United States tried a number of its own personnel [see *United States v. Calley*, 46 CMR 1131 (1973), *aff'd* 48 CMR 19 (1973), habeas corpus granted, 382 F. Supp. 650 (1974), *rev'd* 519 F. 2d 184 (1975), *cert. den.* 425 U.S. 911 (1976)]. See also GARY I. SOLIS, *SON THANG: AN AMERICAN WAR CRIME* (1997). It tried none of the enemy despite criminal acts such as the shooting of two innocent American prisoners of war as a reprisal for the trial and execution by the South Vietnamese of a terrorist bomber caught in the act.

50. In *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2542 (1996) 34 I.L.M. 1595 (1995), the United States Circuit Court, Second Circuit, held that under the Alien Tort Act of 1789 and the Torture Victim Protection Act of 1991 [106 Stat. 73 (1992), 28 U.S.C. 1350 note (Supp. V, 1993)], civil suit could be brought in United States Courts against the perpetrators of genocide, war crimes, and crimes against humanity in foreign countries by the victims or their representatives where service of process was accomplished in the United States.

VI

The U.S. Freedom of Navigation Program: Policy, Procedure, and Future

Dennis Mandsager

THE U.S. FREEDOM OF NAVIGATION (FON) PROGRAM has, for nearly two decades, repeatedly demonstrated its utility in furthering U.S. national interest in maintaining freedom of navigation and overflight on, over, and under the oceans. Indeed, other maritime nations should consider adoption of such a program, either unilaterally or cooperatively with the United States, in order to ensure the stable and predictable law of the sea regime that facilitates effective naval operations. This article analyzes the FON Program, with a focus on the operational assertions of navigation and overflight rights by U.S. military ships and aircraft.¹

The FON Program seeks to encourage coastal States to conform their ocean claims to international law through peaceful exercise of navigation and overflight rights in ocean areas where such States have made excessive or illegal maritime claims. The program, which began in 1979, is a joint effort of the Department of Defense (DoD) and the Department of State (DoS).² It operates on three levels: operational assertions, or FON operations, by military units; diplomatic protests of excessive claims or other diplomatic representations by the DoS; and DoS/DoD consultations with representatives of other States in an effort to promote stability and consistency

in the law of the sea.³ Since 1979, over 100 diplomatic protests have been filed and over 300 operational assertions have been conducted.⁴

Legal Divisions of the Sea

To grasp the relationship between excessive claims and FON assertions, it is first necessary to understand the legal divisions of the sea and of navigation and overflight rights in its various zones.⁵ All maritime zones are measured from “baselines.” Baselines normally follow the low-water mark along the coast. In very limited geographic situations, such as deeply indented coastlines, a series of straight baselines may be employed by connecting appropriate points.

All waters inside baselines are internal waters, where the coastal State exercises near absolute sovereignty. Except in limited distress situations, foreign ships and aircraft must have permission to enter internal waters. Immediately beyond the baselines lies the territorial sea, which may extend seaward to a maximum of 12 nautical miles. Coastal State sovereignty in this area is subject to the right of innocent passage, i.e., continuous and expeditious surface transit through it. Aircraft overflight and submerged passage in territorial waters are not permitted, without coastal State permission. When transiting in or over territorial seas that are part of an international strait, ships and aircraft may engage in continuous and expeditious transit passage in their “normal mode.” For example, formation steaming, flight operations, and submerged transits are permitted when in transit passage.

A special regime exists for archipelagoes. Archipelagic, or island, nations may draw baselines which connect their islands, subject to certain limitations, and create sovereign archipelagic waters. These waters are subject to the right of archipelagic sea-lanes passage (essentially the same as transit passage) in all routes normally used for international navigation or overflight and in sea-lanes designated by the archipelagic State. Innocent passage applies in archipelagic waters outside these and normal routes.

All waters seaward of the territorial sea are international waters where the ships and aircraft of all States enjoy the high seas freedoms of navigation and overflight.⁶ International waters include the contiguous zone, exclusive economic zone (EEZ), and high seas. A State may enforce customs, fiscal, immigration, and sanitary laws in a contiguous zone, which may extend as far as 24 miles from the baseline. It may also exercise sovereignty over resources on its continental shelf and in its EEZ. The EEZ may extend to 200 miles from the

baseline, whereas the continental shelf extends to between 200 and 350 miles, depending in its topography. Subject to the resource-related rights of the coastal State, the freedoms of navigation and overflight in the EEZ, or above the continental shelf where it extends beyond 200 miles are the same as on the high seas. Other than the aforementioned rights, coastal States do not exercise sovereignty over international waters.

Excessive Claims and International Law

As a maritime nation, the national security of the United States depends in great part on the ability to exercise the freedoms of navigation and overflight in and over the world's oceans. Coastal States often assert maritime claims of sovereignty, jurisdiction, or other rights that are inconsistent with international law. These excessive claims attempt to restrict the United States' ability to exercise its rights at sea, including the conducting of military exercises and operations. Examples of excessive claims include:

- Territorial sea claims in excess of 12 nautical miles
- Exclusive economic zone claims that purport to restrict military exercises
- Improperly drawn straight baselines that purport to convert territorial sea areas or international waters (EEZ or high seas) into internal waters, or international waters into territorial waters
- Claims requiring advance notification or permission for innocent passage of warships through the territorial sea
- Archipelagic claims that do not permit archipelagic sea-lane passage in all normal routes of navigation or overflight
- Territorial sea claims in international straits that do not permit transit passage, including overflight of military aircraft or submerged or surface transits, without prior notice
- Security zones in international waters that exclude or restrict entry by warships and military aircraft.⁷

The FON Program's response to excessive claims is based on fundamental international law principles. If maritime nations acquiesce in an excessive claim by failing to exercise their rights, then the claims may eventually be considered to have been accepted as binding law. Examples of change in the law of the sea through acquiescence include the extension of the territorial sea from three nautical miles to twelve, and general acceptance of the EEZ. Given the normative import of acquiescence, both diplomatic protests and the exercise of rights are necessary to preserve operating freedoms.⁸

Military Strategy and U.S. Interests

In the post-Cold War era, the U.S. strategic focus has shifted from a global threat to new challenges. Nevertheless, key elements of our traditional military strategy—forward presence and a crisis response capability—continue to apply. In *National Military Strategy*,⁹ the principal threats to America's security are described as regional dangers (potential conflicts among States), asymmetric challenges (unconventional challenges using means the U.S. cannot match in kind, such as terrorism), transnational threats (emergencies, extremism, ethnic disputes, crime, illegal trade, and other challenges), and wild cards (future developments). It further describes four strategic concepts that govern the use of U.S. forces to meet the demands of the environment: strategic agility, the timely employment and sustainment of military power; overseas presence, the visible posture of U.S. forces in or near key regions; power projection, the ability to rapidly deploy and sustain forces; and decisive force, the commitment of sufficient military power to achieve the right resolution. Each depends on the traditional freedoms of navigation and overflight in and over international waters, international straits, and archipelagic sea-lanes, as well as innocent passage through territorial seas and archipelagic waters. Without freedom of navigation, the ability of the United States to project military power, provide logistics support, maintain forward presence, and accomplish missions such as disaster relief, humanitarian assistance, and noncombatant evacuations, will be severely hampered. U.S. strategy requires the ability to move forces quickly and without the advance permission of coastal States through the Straits of Singapore, Malacca, Bab el Mandeb, Hormuz, and Gibraltar, the Philippine and Indonesian sea-lanes, and other key areas. Transit must include surface navigation of warships, submerged submarine transit, and air transit by military aircraft.

Generally, it is in the best interests of both coastal and maritime States that the coastal State not be faced with a decision as to whether or not to permit transits. For example, after certain NATO allies denied permission to cross their land territory in April 1986, U.S. military aircraft overflew the Strait of Gibraltar to conduct air strikes against targets in Libya in response to a Libyan-sponsored terrorist attack on U.S. military personnel. The coastal States—Spain and Morocco, in particular—were not required to “vote” on the propriety of the self-defense mission by consenting (or not consenting) to transit passage through their territorial seas within the Strait of Gibraltar. Similarly, during Operations Desert Shield and Desert Storm, the right of

transit passage enabled U.S. and Coalition forces to transit the straits of Bab el Mandeb and Hormuz without formal coastal State authorization.

An example from *National Security and the Convention on the Law of the Sea*¹⁰ demonstrates the importance of mobility in the movement of a conventionally powered, six-ship carrier battle group from Yokosuka, Japan, to the Persian Gulf. If transit through the Strait of Malacca, the Indonesian archipelago, and the Torres Strait were denied, rerouting around Australia would be necessary. This would delay the arrival of the battle group by sixteen days and result in \$2.9 million additional fuel costs.¹¹ Albeit unlikely, the scenario offers a clear and specific picture of the potential monetary and opportunity costs of mobility restrictions.

In addition to transit rights, traditional high seas freedoms underlie the ability to conduct robust naval operations. For instance, they permit military forces to engage in flight operations, exercises, surveillance and intelligence activities, and weapons testing. Other lawful uses of the oceans important to U.S. military interests, albeit not directly related to navigation, include laying submarine cables, hydrographic surveys, telecommunications activities, and the collection of marine weather and oceanographic data.

In sum, an effective forward defense requires that U.S. forces be available when and where needed to respond to commitments and to preserve the integrity of an alliance or coalition. This position is reflected in U.S. Navy and Marines Corps service doctrine. In . . . *From the Sea*, the Chief of Naval Operations and the Commandant of the Marines Corps have stated:

Naval expeditionary Forces are: . . . [u]nrestricted by the need for transit or overflight approval from foreign governments in order to enter the scene of action. The international respect for freedom of the seas guarantees legal access up to the territorial waters of all coastal countries of the world. This affords Naval Forces the unique capability to provide peaceful presence in ambiguous situations before a crisis erupts.¹²

In addition to military uses, the United States has myriad other diverse and vital interests in the oceans. Guaranteed access to resources within the high seas, in the exclusive economic zone, and on the continental shelf foster economic well-being. Resource management and environmental protection are key elements in preserving these resources. The scientific community depends on its freedom to conduct marine scientific research. Of course, the U.S. relies heavily on commercial sea-lanes as the trade routes. Disruptions in the flow of commerce have the potential for devastating effects on the global economy.

U.S. Oceans Policy and the Law of the Sea Convention

The 1982 United Nations Convention on the Law of the Sea (LOS Convention) is central to U.S. oceans policy and the FON Program, for it provides a detailed framework for use of the oceans.¹³ In particular, the Convention specifies the maximum breadth of each maritime zone and the rights and duties therein, defines the standards for establishing baselines, guarantees freedom of navigation and overflight on, under, and over international waters, and codifies the rights of innocent passage, transit passage, and archipelagic sea-lanes passage for both commercial and military users.

In 1982, President Ronald Reagan announced that the United States would not sign the LOS Convention due to objections to various deep seabed mining provisions in Part XI.¹⁴ The next year, the President issued an ocean policy statement in which he declared that the U.S. would comply with the non-seabed mining provisions of the Convention because they “generally confirm existing maritime law and practice and fairly balance the interests of all states.”¹⁵ He also announced that the U.S. would “exercise and assert its navigation and overflight rights and freedoms on a worldwide basis . . . consistent with . . . the Convention . . . [but] will not . . . acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.”¹⁶ This statement reaffirmed the Freedom of Navigation Program, which had existed since 1979.

In 1994, Secretary of Defense Les Aspin repeated the central oceans policy theme when he stated that “[t]he armed forces continue to be the instrument for the United States to exercise and assert its navigation and overflight rights and freedoms consistent with the 1982 Law of the Sea Convention.” Secretary Aspin further stated that “it is necessary for maritime nations . . . to protest excessive claims through diplomatic channels and to exercise their navigation and overflight rights in the disputed regions. The United States has accepted this responsibility as an important tenet of national policy. Therefore, the Department of Defense maintains an active Freedom of Navigation Program.”¹⁷

Secretary of Defense William Perry reiterated this view in 1994: “[t]he nation’s security has depended upon our ability to conduct military operations over, under, and on the oceans. We support the [1982 LOS] Convention because it confirms traditional high seas freedoms of navigation and overflight;

it details passage rights through international straits; and it reduces prospects for disagreements with coastal states during operations.”¹⁸

The LOS Convention came into force for its parties on November 16, 1994. Fortunately, earlier in 1994, UN-sponsored negotiations had resulted in an agreement that reforms the deep seabed mining provisions of the LOS Convention to address long-standing objections of the U.S. and other industrialized nations.¹⁹ Removal of those objections has opened the way for U.S. acceptance of the LOS Convention. In October 1994, the President transmitted the Convention and the U.N.-sponsored agreement to the Senate for its advice and consent.²⁰

In 1997, Secretary of Defense William Cohen reiterated the theme of previous administrations and Secretaries: “The LOS Convention . . . establishes rules . . . regarding freedoms of navigation and overflight essential for maintaining the global mobility, presence, and readiness of U.S. armed forces. . . . The United States . . . has much to gain by becoming a party.”²¹ He further stated that “despite positive developments in the law of the sea, it remains necessary for maritime nations, like the United States, to protest excessive claims . . . through diplomatic channels and to exercise . . . rights in disputed areas. The . . . Freedom of Navigation Program has challenged excessive claims to counter any argument that such claims are valid due to acquiescence over time.”²²

On balance, U.S. oceans policy has been effective. United States forces generally have operated consistent with the LOS Convention without significant repercussion. Most criticism of U.S. operations is based on a misunderstanding of the nature of the operations. For example, military surveys in an EEZ—a high seas freedom—sometimes are mistaken for marine scientific research, which is subject to coastal State consent. Another common misunderstanding results when a coastal State observes a military aircraft or warship apparently violating its territorial seas when it is actually transiting an international strait in a transit passage mode. When queried as to its purpose, the aircraft or ship responds with a simple explanation, such as: “This is a U.S. Navy aircraft in transit passage.” The response generally satisfies all concerned.

The success of the existing policy, however, does not mean that U.S. military strategy is best served by the U.S. remaining a non-party to a comprehensive, widely accepted convention governing the world’s oceans. On the contrary, the 1982 LOS Convention reflects not only existing custom, but fairly balances the competing interests of coastal and maritime States. The Convention provides a solid framework for environmental protection, and enhances the ability to study and to protect the marine environment. By becoming a party, the U.S. will be in a better position to influence law of the sea

developments in related fora, such as the International Maritime Organization (IMO) and regional fishing organizations. Moreover, universal adherence promises stability and predictability for the movement of commercial cargo, while guaranteeing, through its EEZ provisions, coastal state control of economic activity off its shores.

As to the FON Program, a widely accepted Convention should, over time, reduce its stressors, for States will be far less likely to make or enforce ocean claims beyond those permitted by its provisions. After all, treaties are more stable than customary international law, which is often vague, difficult to enforce, and malleable. The rules are easier to identify than with customary law's constant evolution through claim and counterclaim. (Indeed, the U.S. position that the LOS Convention represents customary law has been questioned by some nations.) In addition, the Convention provides more detail and clarity than customary law. The listing of activities permitted and not permitted during innocent passage is one of many examples.

Ultimately, the Convention regime provides the best avenue to order and stability in the law of the sea. Its navigation and overflight provisions provide a solid oceans framework for the execution of military strategy and a clear legal framework for the execution of the FON Program, while its dispute resolution mechanism is generally less politically and practically costly than confrontation or acquiescence.

Freedom of Navigation Operations in Practice

FON assertions are directed in operation orders that specify procedures and approval authority for the commander. The orders generally delineate when the participating ship or aircraft will enter and exit the area of the excessive claim and when the unit will enter and exit the U.S.-recognized territorial sea or other ocean zone involved in the assertion. FON assertion tracks are then plotted on charts and reviewed for accuracy by navigation specialists. Operation orders may also provide detailed guidance on how to respond to coastal State queries concerning the ship's or aircraft's presence.

Rules of engagement (ROE) provide guidance on the use of force in self-defense in the unlikely event a coastal State responds by force to the assertion. Intelligence estimates of threats, to which the ROE are tailored, are included in the order. The *DoD Maritime Claims Reference Manual* provides commanders a detailed listing of the maritime claims of all coastal nations.²³ The *Manual* also lists many instances in which the United States has protested excessive claims or conducted operational assertions against them. Particularly useful is *The*

Commander's Handbook on the Law of Naval Operations,²⁴ which provides commanders and staffs a ready reference concerning the legal divisions of oceans and airspace and the corresponding rights and duties of the coastal and other States therein.

Effective operations require comprehensive training and a multidisciplinary approach. Fleet units must conduct routine training and exercises that include law of the sea and rules of engagement concepts to ensure compliance with international law and U.S. oceans policy. Thereafter, operators, planners, intelligence specialists, and legal advisors must work together to ensure that operations are conducted in an efficient, effective, and safe manner, consistent with international law.

To document the operation, each unit provides an after-action report to superiors in the chain of command. Subsequently, the Secretary of Defense publishes an unclassified annual report of assertions conducted during the previous fiscal year.²⁵ It is this listing which places the international community on notice of U.S. actions demonstrating non-U.S. acquiescence in excessive claims.

With diplomatic protests of excessive claims, one might query why operational assertions are needed at all. After all, in strict legal terms, timely diplomatic protests might suffice to protect against technical legal acquiescence in an illegal claim. Nevertheless, there are compelling policy reasons for conducting operational assertions.

First and foremost, protests without operations give the coastal State exactly what it wants—restrictions on our mobility and a change in our behavior consistent with the illegal claim. For example, North Korea purports to exclude foreign military forces from its 50-nautical-mile security zone. The U.S. has protested the claim, but failure to operate within the zone would play into North Korea's hands by effectively respecting the claim. Similarly, the Government of the Philippines claims that all waters within its archipelagic baselines are internal waters not subject to archipelagic sea-lanes passage. Again, protest alone is not enough. An illegal claim cannot be permitted to deny U.S. forces the ability to transit critical sea-lanes that have been used by mariners for centuries. Of course, operational assertions send an even stronger signal than diplomatic protests, for protests alone seldom provide a sufficient incentive to impel relinquishment of the claim. Moreover, if assertions or routine exercises of rights are not conducted in normal times, the political cost of an assertion during a crisis is likely to be far higher. For instance, failure to regularly transit the Taiwan Strait would complicate the ability to operate there in times of crisis.

Frustrations, Challenges, and Successes

While policy guidance is published in the Pentagon and at senior military commander headquarters in traditional top-to-bottom fashion, the FON Program is implemented using a reverse, bottom-up procedure. Periodically, higher authority will issue a letter or message that encourages the operating forces to conduct assertions. Rarely, if ever, is a specific assertion directed.²⁶ On the contrary, most assertions by Navy ships or aircraft begin with a proposal developed by a numbered fleet commander or a subordinate command. Many are later canceled by higher authority for reasons impossible for the subordinate command to have foreseen, often after the operating forces command has expended great energy in planning the assertion. Understandably, frustration results. To help alleviate this problem, Pentagon policy makers should direct assertions from time to time, particularly in the case of long, unchallenged claims; those who direct cancellation of an assertion must also provide the earliest possible notice and share their rationale with those in the field.

More significantly, one or more of the players in a FON assertion will misunderstand the program and oppose it as provocative. The nay-sayers at times include U.S. embassy officials, military commanders, staff officers, and DoS and DoD officials—many of whom have had no previous experience with the program. The only answer is education and training. The program merits and requires continuous explanation.²⁷

At times, assertion opportunities are missed due to erroneous perceptions that the coastal State will use force to prevent it or take other retaliatory action. In fact, rarely is there any type of response. FON action officers must study the historical record of assertions to ascertain the likely response. Intelligence officers and country specialists can serve as important sources of information concerning coastal State sensitivities.

The high tempo of current operations and the shrinking numbers of available ships and aircraft are practical impediments to some assertions. The challenge for the action officer is to know all of the excessive claims in the area of responsibility, and to take advantage of any units that might be operating in the vicinity of such a claim. Generally, given the worldwide operation of U.S. ships and aircraft, at some point in time, a ship or aircraft will be close enough to conduct the assertion with little or no additional costs in time or money.

In the end the frustrations and challenges are outweighed by the success stories. As a result of the routine and frequent exercise of navigation and overflight rights around the world, law of the sea concepts such as innocent passage of warships, transit passage, and archipelagic sea-lanes passage are well

established in customary international law, a number of coastal States have withdrawn excessive claims,²⁸ and the right to conduct military operations with due regard for resource related activities in the EEZ of coastal states is widely understood and respected. The returns benefit not only the U.S., but all nations interested in promoting maritime mobility.

Even the instances of friction may prove beneficial. Recall the Black Sea “bumping” incident of February 1988, when two U.S. ships entered the Soviet territorial sea in the Black Sea during a FON operation. The subsequent “shouldering” by two Soviet warships led to a U.S. diplomatic protest. Ultimately, the two governments reached a consensus²⁹ that the law of innocent passage is expressed in the LOS Convention, that all ships, including warships, enjoy the right of innocent passage, that neither prior notice nor authorization is required prior to innocent passage, and that internal coastal State laws should conform to this uniform interpretation of the applicable legal regime. Optimally, future assertions will produce similar results.

The FON Program has provided one clear benefit to the operating forces and operational commanders and their staffs. Planning and conducting the assertions have caused a greater understanding of law of the sea principles and their effect on military operations. When conducting or approving the assertions, operators and their legal advisors must know with specificity in which ocean zone the ship or aircraft will be operating, and understand its corresponding rights and duties. Real world operations demand a much more intense focus than that needed in training or academic environments; mistakes can be politically embarrassing for the United States.

Future

There was no question as to the need for a FON Program in an international environment that lacked a widely accepted law of the sea treaty. But as the LOS Convention becomes widely accepted, will a FON Program still be needed? The answer is “yes.”

First, excessive jurisdictional oceans claims will likely always exist. Even parties to the Convention may enact domestic legislation or regulations inconsistent with its provisions. Such threats to the Convention regime should remain a focus of the FON Program.

Second, the U.S. is not yet a party to the Convention. Some States persist in their position that certain navigation and overflight rights articulated in the Convention are available only to parties. An active FON Program is necessary to preserve those rights for the U.S. in the face of that position.

Third, while the Convention is the result of remarkable efforts, it is, nevertheless, a product of committees and compromises. There are ambiguities and gaps—some unintentional, some intentional, some creative, and some the product of a lack of agreement. Such ambiguities and gaps, coupled with pressures for restrictive changes, particularly in the environmental arena, mandate a continuation of the program in some form. In that regard, consider the following:

- Marine scientific research (MSR) is subject to coastal state jurisdiction in the EEZ, but the LOS Convention fails to define the term, a particular problem because hydrographic surveys and the collection of marine environmental information for military purposes are considered by the U.S. to be high seas freedoms that are not subject to coastal state jurisdiction, even when conducted in the EEZ.³⁰

- The Convention does not address flight information regions (FIRs) or air defense identification zones (ADIZs). Coastal States sometimes demand prior notice or prior permission for U.S. military aircraft transiting these zones—even if an aircraft is flying under due regard vice ICAO procedures, will not enter territorial airspace, or is in transit passage or archipelagic sea-lanes passage.³¹ To provide advance notice under these circumstances would create an adverse precedent for restrictions on mobility and flexibility.

- There are several U.S. interpretive positions applicable to the transit passage regime that are not specifically addressed in the Convention. For example, it is the U.S. position that transit passage extends not only to the waters of the straits, but also to the normally used approaches; that transit passage applies to a corridor that extends from shore to shore; and that the regime applies to all straits capable of being used for international navigation.³² While these interpretations are reasonable and tend to promote navigational safety and efficiency, they are not necessarily accepted by all coastal States.

- If an archipelagic State designates sea-lanes or air routes, the Convention requires that “all normal passage routes” be included. Coastal and maritime States tend to disagree on designations. Routine use of these routes and operational assertions against excessive claims will preserve flexibility.

- The transit passage and archipelagic sea-lanes passage regimes permit ships and aircraft to operate in their normal mode. While not specifically spelled out in the Convention, the U.S. position is that submarines may transit submerged. Further, all ships and aircraft may transit in a manner consistent with sound navigational practices and the security of the force, to include formation steaming and the operation of radars and other sensors, as examples. Again, the Convention does not specifically articulate these rights.

- Consistent with the LOS Convention (Articles 42, 95, 96, 110, and 236), U.S. military ships and aircraft enjoy sovereign immunity.³³ Nevertheless, they are often subjected to demands or requests to submit to searches or inspections. The FON Program can demonstrate a clear sovereign immunity policy needed to ensure these demands are resisted to avoid erosion of this principle.

A widely ratified Convention represents the best available path to oceans stability. All nations should carefully balance any objections to the reformed Convention against the significant gains that would be achieved through acceptance. The FON Program has served and will continue to serve U.S. interests well. In the future, an effective FON Program will have U.S. forces exercise their rights to ensure that practice under the LOS Convention is consistent with customary international law and operational requirements. Other maritime States which have benefited from the U.S. program, should consider the adoption of such a program—modified to meet their specific needs—to ensure their law of the sea rights are preserved. States with similar maritime interests could clearly benefit from a coordinated FON program.

Notes

1. J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* (66 INTERNATIONAL LAW STUDIES, 1994) [hereinafter ROACH & SMITH] is an excellent reference that provides a detailed description of “diplomatic and military efforts undertaken by the United States Government to preserve and enhance navigation and overflight freedoms worldwide.” The second edition of the book was published as *UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS* (1996).

2. See U.S. DEPT OF STATE, GIST, U.S. FREEDOM OF NAVIGATION PROGRAM, Dec. 1988.

3. Though other U.S. government agencies do participate in some of these consultations; the Department of State is generally in the lead, with the Department of Defense being the major supporting player.

4. See WILLIAM S. COHEN, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS (1997), at I-1.

5. Detailed descriptions of the legal divisions of oceans and airspace and the rights of navigation and overflight can be found in *THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*. The Handbook was published jointly by the Navy, Marine Corps, and Coast Guard in 1995 as Naval Warfare Publication (NWP) 1-14M/MCWP 5-2.1/COMDTPUB P5800.1 [hereinafter NWP 1-14M]. It sets out fundamental principles of international and domestic law that govern naval operations at sea during peacetime and during periods of armed conflict. It was previously published as NWP 9 (Rev. A)/FMFM 1-10 in 1989 and as NWP 9 in 1987. The *ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* was published on November 15, 1997. Prepared by the Oceans Law and Policy Department, Center for Naval Warfare Studies, Naval War College; it is a footnoted version of NWP 1-14M with numerous references to sources of legal authority.

6. See NWP 1-14M, *supra* note 5, para. 1.5.

The U.S. Freedom of Navigation Program

7. ROACH AND SMITH, *supra* note 1, provides a detailed discussion of many excessive claims.

8. See NWP 1-14M, *supra* note 5, para. 2.6; and ROACH AND SMITH, *supra* note 1, at 5.

9. NATIONAL MILITARY STRATEGY was published in 1997 by the Chairman of the Joint Chiefs of Staff (CJCS) to articulate the strategic direction U.S. Armed Forces should take. In formulating the document, CJCS derived guidance from A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY, which was published by The White House earlier in 1997.

10. NATIONAL SECURITY AND THE CONVENTION ON THE LAW OF THE SEA is a U.S. Department of Defense position paper that analyzes DoD interests in having the United States become a party to the 1982 United Nations Convention on the Law of the Sea. The Second Edition was published in January 1996.

11. *Id.* at 10.

12. ...FROM THE SEA is a Navy and Marine Corps White Paper that outlines a new strategic direction for naval forces in the 21st century. It was published in 1992, and updated by FORWARD . . . FROM THE SEA in 1994.

13. The LOS Convention, U.N. Doc. A/CONF.62/122 (1982).

14. 18 WEEKLY COMP. PRES. DOC. 877 (Jul. 9, 1982).

15. 19 WEEKLY COMP. PRES. DOC. 383-385 (Mar. 10, 1983).

16. *Id.*

17. See LES ASPIN, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS (1994), at G-1.

18. Statement on the Signing of an Agreement on the U.N. Convention on the Law of the Sea, Office of the Assistant Secretary of Defense News Release, July 29, 1994.

19. The agreement was adopted by the U.N. General Assembly on July 28, 1994. It is to be applied with the LOS Convention as a single agreement. See U.N. DOC. A/RES/48/263, Aug. 17, 1994 and accompanying "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982."

20. See Letter of Transmittal, S. TREATY DOC. 103-39, (1994).

21. See Cohen, *supra* note 4, at H-1.

22. *Id.* at I-1.

23. The manual is prepared by the Department of Defense Representative for Oceans Policy Affairs and is published as DoD Directive 2005.1-M, January 6, 1997. Earlier versions were published in 1987 and 1990.

24. NWP 1-14M, *supra* note 5.

25. This report is included in SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS. As reflected in the April 1997 report (Appendix I), from 1 October 1995 to 30 September 1996, FON assertions were conducted against the following countries with excessive maritime claims: Bangladesh (excessive straight baselines, claimed security zone, and claimed territorial airspace beyond 12 NM); Burma (excessive straight baselines, claimed security zone, and claimed territorial airspace beyond 12 NM); Cambodia (excessive straight baselines, claimed security zone, and claimed territorial airspace beyond 12 NM); China (prior permission for warships to enter the territorial sea); Egypt (excessive straight baselines and prior permission to enter the territorial sea); India (prior permission for warship to enter the territorial sea); Iran (excessive straight baselines and prior permission for warship to enter the territorial sea); Maldives (excessive straight baselines and prior permission to enter the territorial sea); Oman (excessive straight baselines and prior permission to enter the territorial sea); Pakistan (prior permission for warships to enter the territorial sea); Philippines (excessive straight baselines and claims archipelagic waters as internal waters); Sudan (prior permission for

warship to enter the territorial sea); Vietnam (excessive straight baselines and claimed security zone); and Yemen (prior permission for warship to enter the territorial sea). See Cohen, *supra* note 4, at I-1.

26. In multiple tours as a FON action officer, I do not recall a single instance of a directive to conduct a particular FON assertion emanating from Washington, D.C.

27. THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS is a useful tool for teaching law of the sea principles and for sharing U.S. views on oceans policy. I personally have provided copies to military commanders and staff officers, U.S. embassy officials, and foreign counterparts. The publication has always been well received.

28. See ROACH & SMITH, *supra* note 1, at 255-56.

29. On September 23, 1989 at Jackson Hole, Wyoming, U.S. Secretary of State James Baker and Soviet Foreign Minister Eduard Shevardnadze signed the Uniform Interpretation of Rules of International Law Governing Innocent Passage, 28 I.L.M. 1444-7 (1989).

30. NWP 1-14M, *supra* note 5, para. 2.4.2.1-2.

31. For a discussion of due regard, ICAO procedures, and air navigation, see NWP 1-14M, *supra* note 5, para. 2.5.

32. See generally NWP 1-14M, *supra* note 5, para. 2.3.3.1.

33. For a brief discussion of sovereign immunity principles, see NWP 1-14M, *supra* note 5, para. 2.1.2 and ROACH & SMITH, *supra* note 1, at 263-264.

VII

The Framework in the Founding Act for NATO-Russia Joint Peacekeeping Operations

Myron H. Nordquist

AT THE MINISTERIAL MEETING of the North Atlantic Council held at NATO Headquarters in Brussels on 10 December 1996, Secretary General Javier Solana was tasked with developing an agreement on a new NATO-Russia relationship. The foundation for the consultations was based on previous “16 plus 1” discussions; that is, the sixteen members of NATO plus the Russian Federation. The participation of the Russian Federation in the Partnership for Peace programs and in contributing troops to the Implementation Force (IFOR) in Bosnia and Herzegovina were cited as favorable factors for this initiative. The NATO ministers envisioned a fundamentally new European security era in which NATO and Russia’s relationships would deepen and widen. Agreement was to be explored on a “framework of its future development” expressed in a “document or . . . Charter.”

Founding Act

The Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation was signed in Paris on 27 May 1997. On one

side, the signatories were the Secretary General of the Atlantic Alliance, Javier Solana, and NATO Heads of State such as President William Clinton, and on the other side, the President of the Russian Federation, Boris Yeltsin. The signatories stressed the historic significance of the Act that was heralded as beginning a “new chapter of Euro-Atlantic security.”¹ At the Act’s signing ceremony, repeated references were made to the end of the Cold War and to the notion that the Act was laying the foundation for NATO-Russia collective security cooperation in the twenty-first century. President Clinton spoke enthusiastically both about a new Russia and about building a new NATO. President Yeltsin, not to be outdone, expressed at least equal enthusiasm for the Act. Indeed, the euphoria of the Russian President was such that he unexpectedly announced at the end of the ceremony: “I, today, after having signed the document am going to make the following decision. Everything that is aimed at countries present here, all of those weapons are going to have their warheads removed. (Applause.)”² A few hours later, spokesmen for President Clinton were still seeking “clarification” about the meaning of the Russian President’s “impromptu remark.”³

The matter of detargeting or deactivation of Russian missiles is only one of many significant international security issues that requires clarification as a result of the signing of the Act. The long-term ramifications in the Act for either classic peacekeeping or new enforcement action operations involving forces from both NATO and Russia is another important area that merits study. In this latter case in particular, professional military experts must look for guidance about joint operations conducted by the combined military forces of NATO and Russia.

The Founding Act is an umbrella document that, at best, lays out a general framework for concrete action. Practical as well as conceptual problems are immediately presented. And, with such far-reaching consequences, it is predictable that differing interpretations of the Act’s numerous provisions will surface, probably sooner rather than later. When this happens, the view advanced in this essay is that the language in the document itself must be the starting basis for analysis. In fact, this point already arose on the day the Act was signed. A reporter asked President Clinton’s Press Secretary, Mike McCurry, whether he was “convinced now that Boris Yeltsin understands the Russian role [in the Act] in the same way that the United States understands the Russian role and the rest of NATO does?” McCurry responded: “I don’t think he [Yeltsin] ever had any understanding but what was in the document that he signed a short while ago.”⁴

Interpreting the Founding Act

Significant implications flow from adopting McCurry's position. Common sense as well as traditional legal practice supports the proposition that the language actually embodied in the text of the Act is the best evidence of the intentions of the signatories. The actual words agreed to by the signatories are certainly entitled to more weight than are the speculations of third party observers or the perception spin given by interested parties to the media.

An initial step in selecting rules to interpret the text of a multilateral document is to determine its status under international law. In the case of the Founding Act, this is not as straight forward as one might expect. Recall that the Ministerial guidance provided to NATO's Secretary General was vague about the form in which the agreement might be expressed. The signatories obviously chose to call the final document an "act." This deliberate decision by the nations concerned merits a brief examination.

The term "act" is usually "reserved for a multilateral convention concluding a session of States on important questions that lays down the law between them for the future."⁵ An example is the "Concluding Act of the Negotiation on Personnel Strength of Conventional Armed Forces in Europe" signed in Helsinki on 10 July 1992.⁶ In Section VIII of this instrument, it is explicitly provided that the "measures adopted in this Act are politically binding." This Act dealing with Conventional Forces was an outgrowth of the Conference on Security and Cooperation in Europe: Final Act concluded in Helsinki on 1 August 1975, that was also a legally non-binding document.⁷ The question of whether a Final Act is a "treaty or merely a machinery arrangement to be utilized by the parties depends upon its interpretation."⁸ The problem with this observation is that it begs the question of what rules of interpretation are to be selected to interpret?

The Founding Act is an international agreement embodying a number of specific commitments that is signed by sixteen Heads of State or Government. These officials are sophisticated people who are well advised by legal experts. Such officials must be presumed, for example, not to have chosen to call the document a "joint declaration" or to select a similar label that clearly connotes noncontractual obligations. In international law practice, a joint declaration is typically a public announcement by several States that expresses a common policy outlook without taking on the character of a contractual or legal obligation. Towards the other end of the international obligation spectrum is the formal treaty that embodies the solemn consent by a sovereign State to accept binding legal commitments. The Founding Act was also not called a

“treaty,” and that too must be presumed to be a deliberate choice of the leading political leaders of the signatory States. Considered only from a process point of view, that is unfortunate, for if the Act were a treaty, this examination would be unnecessary. The rules to interpret the meaning of the Act’s text under international law would, without doubt, be found in the Vienna Convention on the Law of Treaties.⁹ It is noteworthy, however, that, even in this “treaty on treaties,” the fact that the signatories consciously chose to call the document an “Act” does not mean that it is not a treaty for the purposes of using the rules in the Vienna Convention. Moreover, the “Act” label does not necessarily mean that the document fails to meet the requirements for a treaty under the domestic law of the United States.

The Vienna Convention provides that the definition of “treaty” in the international law sense may be different from the domestic law sense. Use of terms in the Vienna Convention sense is “without prejudice to the use of those terms or to the meanings which may be given to them in the internal laws of any State.”¹⁰ This safeguard takes into account the different internal ratification processes of States. The comment by the International Law Commission about this point in the Vienna Convention reads:

In many countries, the constitution requires that international agreements in a form considered under the internal law or usage of the State to be a “treaty” must be endorsed by the legislature or have their ratification authorized by it. . . . Accordingly, it is essential that the definition given to the term “treaty” in the present articles should do nothing to disturb or affect in any way the existing domestic rules or usage’s which govern the classification of international agreements under national law.¹¹

The Vienna Convention is not in force for the United States, and the treaty interpretation rules therein are, strictly viewed, not governing for a non-party. But the rules of interpretation in the Vienna Convention do represent “generally accepted principles and the United States has also appeared willing to accept them despite differences of nuance and emphasis.”¹² While courts in the United States are generally more willing than those of other States to look outside the instrument, at the *travaux préparatoires*, in most cases, both the U.S. and Vienna Convention approaches lead to the same result.¹³ A closer look at the Vienna Convention is needed to satisfy our quest for what rules are appropriate to interpret the meaning of the Founding Act.

A treaty is defined in article 2 of the Vienna Convention as follows:

... "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and *whatever its particular designation* ... (emphasis supplied).

On its face, the Founding Act is an international agreement in written form concluded between States as evidenced by being signed by a number of Heads of State or Government. The fact that one signatory was the head of an international organization, i.e., NATO, consisting of virtually all the States involved, only adds weight to the impression that important commitments of some significance were being made for Russia, as well as for NATO and its member States. In its own right, NATO is generally accepted in the modern practice of international law as a proper subject to be governed by international law. Along the same line, one may safely assume that the Secretary General possesses full powers to represent the organization in concluding treaties or other international instruments involving binding commitments of various kinds. The government signatories, also *prima facie*, have full powers to act as representatives for the purpose of expressing the consent of their respective States to be bound by the instrument.¹⁴ Thus, from a formality standpoint, the Act as executed could have qualified as a treaty under the definition in the Vienna Convention.

The fact remains, however, that the drafters consciously chose not to treat the Act as a treaty. Indeed, the circumstances surrounding the negotiation and execution of the document suggest that high-level political rather than legal commitments were contemplated. Political obligations differ in important respects from legal obligations. While political obligations are not enforceable strictly speaking, they may be more significant in practical impact. Political commitments are usually more comprehensive in scope and carry greater long-term implications than do legal obligations. This would appear to be a fit characterization of the Founding Act. The Act was signed at an unusually high level with great public fanfare. Moreover, there was no provision for domestic ratification included in the document. Without ratification, most States, including the United States, do not contemplate undertaking binding treaty obligations.

Those analyzing the Act and the meaning of its text are accordingly still left with the practical task of interpreting an international instrument containing important commitments for which there are no universally accepted rules. To deal with the problem, this writer decided to adopt the following approach: the Founding Act will be treated as a treaty for the limited purpose of applying the widely accepted rules of interpretation in the Vienna Convention to analyze

the meaning of the text. This decision is justified because, looking at the entire context, the Vienna Convention rules are the best choice for legal guidance given their global acceptance. Indeed, the writer cannot think of better rules to facilitate a disciplined evaluation of this document. Considering the Act as a treaty for the limited purposes of interpretation obviously does not mean that the Act is equivalent to a treaty embodying binding legal commitments. It does mean that selection of such a disciplined approach is more likely to lead to conclusions consistent with the elevated status of the signatories whose direct participation indicates that the exact wording of the Act was intended to be taken very seriously.

In the case of the United States, there is no evidence that President Clinton intended the Act to be a formal treaty in the sense contemplated by the U.S. Constitution. Had that been his intent, he would have planned to seek the advice and consent of the Senate. There is great wisdom in consulting the Senate early and often on important foreign policy matters, but nothing indicates that the President wanted to present the difficult issues raised by the Act to public debate in the Congress. Given that the Senate is controlled by the opposition party, the President was probably content at this stage to rely upon his inherent powers as Head of State and Commander in Chief of the Armed Forces as the sources of his authority to act. Of course, the fact that a treaty is not perfected in the municipal law sense does not relieve the State of its obligations under international law.¹⁵ Confusion sometimes arises on this point because while the domestic and international law spheres are related, they are often quite distinct. This duality of legal regimes can be quite handy. In this case for instance, President Clinton probably achieved exactly what he wanted for both his domestic and international law purposes. That is, the United States intends to honor the political commitments to other nations made by the President in the Act under international law but is not bound by legal obligations in the Act under domestic law.

In light of the foregoing, the legal status of the Act under either domestic or international law is unaffected merely by using the treaty interpretation principles and rules in the Vienna Convention to help ascertain the meaning of its language. In all events, interpreters use either implicit or explicit rules to reach conclusions about the meaning of text. In this study, the Vienna Convention rules are expected to provide some guidance.

Proceeding on that basis, Article 31(1) of the Vienna Convention first provides the general rule that a treaty must be interpreted in good faith by according ordinary meaning to its terms "in their context and in light of its object and purpose."¹⁶ The context expressly includes agreements relating to

the treaty. In the case of the Founding Act, this category covers many treaties and other forms of international agreements that are cited with favor or directly incorporated by reference. Examples include the UN Charter and the Helsinki Final Act.

Paragraph 3 of Article 31 of the Vienna Convention deals with the subsequent practice of States that is to be taken into account with the context. Sub-paragraph 3(a) identifies subsequent agreements between the parties interpreting the treaty or applying its provisions as part of this subsequent practice. Sub-paragraph 3(b) references “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” Thus, subsequent practice includes both words and deeds.

The primacy of the written text itself over external context is demonstrated by the Vienna Convention’s interpretative rules with respect to supplementary sources. Supplementary means of interpretation may be sought in the preparatory work leading up to the document text and the circumstances of the treaty’s conclusion. But recourse to supplementary means of interpretation is allowed for two limited purposes. Supplementary sources may be consulted either to confirm the meaning of the text itself or to determine the meaning when the text is ambiguous or obscure or leads to a result “manifestly absurd or unreasonable.”¹⁷

The North Atlantic Treaty

Before examining the text of the Founding Act in light of the rules of interpretation in the Vienna Convention, it is necessary to understand the North Atlantic Treaty that created NATO. Certainly there is no argument about applying the Vienna Convention’s rules of interpretation to this treaty in an effort to ascertain the legal parameters governing NATO.

Entering into force in 1949 at the outset of the Cold War, the North Atlantic Treaty established NATO as an organization to provide for the collective defense of its members; that is, an armed attack on one is an attack on all. The operative language is contained in one long sentence in Article 5 of the Treaty:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article

51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.¹⁸

The text of Article 5 is unmistakable about where the armed attack must occur against a Party: the attack must be in Europe or North America. Article 6 is even more geographically specific by expressly citing the “territory of any of the Parties in Europe or North America, . . . on the occupation forces of any Party in Europe, on the islands under the jurisdiction of any Party in the North Atlantic area north of the Tropic of Cancer or on the vessels or aircraft in this area of any of the Parties.”¹⁹

The question that immediately arises for an essay concentrating on peacekeeping is where is the authority in the North Atlantic Treaty for NATO to initiate peacekeeping operations in Bosnia and Herzegovina? Where was the armed attack against a Party as required by Article 5? And even if the Article 51 concept of self-defense was construed to deem that an armed attack occurred, did it take place on the territory of any of the NATO members as concretely defined in Article 6 of the North Atlantic Treaty?

The express mention of Article 51 in Article 5 leaves no room for argument about the point that NATO was conceived as an Article 51 self-defense organization under Chapter VII of the UN Charter. The North Atlantic Treaty was also formally ratified by its Parties (including the Senate of the United States) as a Chapter VII entity. The reason was plain fifty years ago and is plain now. Had NATO been established as a regional collective security arrangement to undertake enforcement actions under Chapter VIII, it would be subject to a Soviet veto in the Security Council. Article 53 of the Charter explicitly provides that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . .” To give the Soviets a veto over NATO actions would defeat the purpose of an organization established to defend against an armed attack by the Soviet Union or its allies in the North Atlantic territories of the Parties.

An argument can be made that while the ordinary meaning of the terms and conditions in Article 5 do not allow NATO to initiate affirmative military action outside the territory of the Parties, the member States agreed to proceed according to NATO procedures. The reasoning is that this is subsequent practice manifesting agreement by the Parties and this makes non-self defense, out-of-area operations legal. On the international law plane, this argument has some validity. Recall that the Vienna Convention recognizes subsequent practice as part of the context to interpret a treaty or to apply its provisions.

The North Atlantic Council did authorize NATO's out-of-area peacekeeping operations and all sixteen member States have manifested their consent to the peacekeeping operations in Bosnia and Herzegovina at the highest levels in many ways.

But there is a problem with this line of reasoning from a Rule of Law perspective. As explained above, the Vienna Convention accords primacy to the ordinary meaning of words in the text. What is the value of a treaty text at all if context in the form of subsequent practice can conflict directly with the ordinary meaning of the words? Strained interpretations of context, as a matter of principle, may not be a subterfuge for amending plain treaty language. The text, and the rules embodied in it, must be honored for the interpretation process has good faith limits. Black cannot be white no matter how strong the political will to declare it so. If the text of a treaty is bad, then the remedy is to amend the language as provided by its terms. The Rule of Law does not lend itself to "picking and choosing" to meet the needs of political expediency. The language is so plain in the North Atlantic Treaty that there is no ambiguity about the point that NATO is an Article 51 self-defense organization under Chapter VII and not a regional enforcement organization under Chapter VIII of the Charter. Agreed subsequent practice, admittedly based on the consent of all the parties, cannot be ascribed the same legal stature as an amendment to the clear terms of a treaty. An argument on the subsequent practice context has to be fashioned in a mode that is at least compatible with the plain meaning of the terms in the treaty. Moreover, in the case of the North Atlantic Treaty, there is an agreed process for making amendments which requires using the same ratification procedures that were used for formalizing the original text. However much one sees the practical and political value of using NATO for activities beyond its constitutional limits, adherence to the Rule of Law is a higher imperative. The short-term gains in ignoring the law cannot outweigh the long-term benefits of following it. This seems elementary but it must be said in this case.

Confusion about the Articles 5 and 6 problem may stem from international law being based on the consent of sovereign States. Essentially, States may do between themselves whatever they agree to do. Third parties seldom have legal standing to complain. Thus, in the sphere of international law, there is no effective legal remedy for an *ultra vires* charge with respect to NATO's out-of-area peacekeeping operations in the absence of the treaty-mandated armed attack. Who has standing to call the sovereign States to task? There is no obligation on a Member State to look behind the ostensible authority of senior representatives in the North Atlantic Council who approve the actions.

Lack of remedy or effective enforcement, however, does not mean lack of law and the obligation to obey the law. There is a duty to obey law on the international plane even in the face of imperfect enforcement. And this philosophical issue is by no means limited to interpretation of the North Atlantic Treaty.

Of course, the enforcement issue is quite different under U.S. domestic law where the Constitution is the supreme law of the land. Both the President and Congress can be held accountable to obey the Law of the Land. Courts do enforce the Constitution and this is at the heart of why the United States promotes the Rule of Law in the former Warsaw Pact nations. Under the domestic law of the United States, the treaty ratification processes of the Constitution must be satisfied if and when a case is presented. If the text of the North Atlantic Treaty is somehow found to admit of the interpretation that the current NATO peacekeeping operations in Bosnia and Herzegovina were contemplated within the four corners of the treaty, the Court may consider supplementary sources such as are found in the debates at the time the Senate gave its advice and consent in 1949. However, this avenue of possible support is unlikely to provide much aid or comfort for the proponents of the current action.²⁰ This is not to suggest that the Senate is unaware today that NATO is conducting out-of-area peacekeeping operations that go beyond Article 51 self-defense. Clear evidence of notice to the Senate is provided when Congress appropriates funds to support NATO's peacekeeping operations in Bosnia and Herzegovina. This formal act suggests political approval by the U.S. Congress, including the Senate. However, use of these implied methods of approval is not the same as adhering to the advice and consent procedures expressly required by the Constitution. When NATO is funded by Congress to conduct peacekeeping operations out-of-area, NATO ought to have unquestionable legal authority to carry out those activities. This is true if for no other reason than lives are being put at risk. The proper way for American officials to proceed is to amend the North Atlantic Treaty as provided in that instrument and as required by the U.S. Constitution. Compliance with the Rule of Law in this case may engender a politically distasteful public debate about the proper role for NATO in the post-Cold War era. Such are the costs of Democracy and respect for the Rule of Law. Since the admission of new members to NATO must be considered in formal advice and consent processes anyway, the Senate has an appropriate opportunity, if it so chooses, to revisit the authority of NATO to act under Articles 5 and 6 of the North Atlantic Treaty.

How might out-of-area peacekeeping activities of NATO be characterized under another treaty, e.g., the UN Charter? The oft-cited reference

to UN peacekeeping as falling under “Chapter VI and a half”²¹ conveys the notion of activities that go beyond peaceful resolution of disputes but stop short of armed self-defense responses. Under treaty interpretation rules, Chapter VI and one half activities are seen as subsequent practice. Unlike the NATO case, the legitimacy of UN peacekeeping operations is derived from a context of subsequent practice that does not violate any express language in the Charter. To take the comparison one step further, the recent NATO actions in Bosnia and Herzegovina could be characterized as “Chapter VII and a half” missions. The idea is that NATO’s peacekeeping efforts there clearly go beyond the “self-defense” of member’s territories in the Chapter VII sense of the UN Charter but stop short of being international enforcement actions in the Chapter VIII sense.

By its express terms, the North Atlantic Treaty also must be interpreted as not affecting “in any way the rights and obligations under the Charter. . . .”²² Modern international law prohibits States from using military force unless the actions are in conformity with the UN Charter. Under the UN Charter, the use of military force is accepted as legitimate for peacekeeping under Chapter VI and a half, for self-defense under Chapter VII, and for enforcement under Chapter VIII. As just noted above, the international community may now be on the verge of accepting Chapter VII and a half as State practice in circumstances such as Bosnia and Herzegovina. By the terms of the Charter, UN peacekeeping and enforcement by regional collective security organization actions require approval by the Security Council (setting aside the controversial Uniting for Peace Resolution debate)²³ where the Russian Federation has a veto. As is discussed below, Russia would also have a veto in any joint NATO-Russia military operations undertaken pursuant to the Founding Act.

Preamble to Founding Act

With the framework governing the use of force in the UN Charter and the North Atlantic Treaty in mind, we turn to the first important point stressed in the preamble to the Founding Act that pertains to future NATO-Russia peacekeeping operations. This is that the political commitments in the Act are undertaken at the highest political levels to signify the start of a fundamentally new relationship between NATO and Russia. The Act is said to define “the goals and mechanisms of consultation, cooperation, joint decision-making and joint action that will constitute the core of the mutual relations between NATO and Russia.”²⁴

Reference is made to the 1991 NATO Summit Conference in Rome where the Alliance revised its strategic doctrine to take account of the collapse of the Soviet Union. The Act then explicitly states the goal of taking on “new missions of peacekeeping and crisis management in support of the United Nations (UN) and the Organization for Security and Cooperation in Europe (OSCE), such as in Bosnia and Herzegovina. . . .” As explained below, what is noteworthy about this political commitment is that Russia has a veto about undertaking peacekeeping operations under either UN or OSCE sponsorship.

A vague reference is also made in the Preamble to addressing “new security challenges” with other countries and international organizations. The meaning of this sentence is sufficiently ambiguous that it is a candidate for contextual interpretation or even interpretation by supplementary sources. For the purposes of this essay, it can be noted that the reference appears to be broad enough to encompass out-of-area peacekeeping operations.

Specific mention is made of NATO’s efforts to develop the “European Security and Defense Identity (ESDI). . . .” In this connection, the North Atlantic Cooperation Council (NACC) is not cited in the Preamble, while the Partnership for Peace (PFP) program is. Unlike the NAAC, the PFP program is concerned with peacekeeping and fifteen PFP countries are participating in Stabilization Force (SFOR) operations in Bosnia and Herzegovina.²⁵ The PFP, started at the January 1994 NATO Summit Meeting, joins 27 mostly Central and Eastern European States (including Russia) with sixteen NATO members. A specific PFP goal is to “create an ability to operate with NATO forces in such fields as peacekeeping. . . .”²⁶ Within the PFP framework, peacekeeping field exercises are undertaken with joint planning facilitated by liaison officers stationed at NATO Headquarters and a “Partnership Coordination Cell” at Supreme Headquarters Allied Power Europe in Mons, Belgium.²⁷

Next, the initiative to establish a Euro-Atlantic Partnership Council (EAPC) is noted in the Preamble to the Act. The EAPC was inaugurated in 1997 and replaces the NACC. All former NACC members and all countries participating in PFP can automatically join the EAPC. Other OSCE members that are willing and able to accept EAPC principles may join by joining the PFP. Lastly, a commitment is made that NATO member States will examine NATO’s Strategic Concept “to ensure that it is fully consistent with Europe’s new security situation and challenges.”

By comparison with the lofty new goals espoused for NATO, the deadpan characterization of Russia in the last paragraph of the Preamble is much more down to earth. The Russian Federation is portrayed as “continuing the building of a democratic society and the realization of its political and economic

transformation.” Its military cutbacks are cited favorably, as are its commitments “to further reducing its conventional and nuclear forces.” Russia’s active participation in peacekeeping operations under UN or OSCE auspices and its contributions to “multinational forces in Bosnia and Herzegovina” are, however, referred to in a positive vein.²⁸

The outline for the body of the Founding Act was provided expressly at the Brussels meeting of the North Atlantic Council Ministers in December 1996. The content for a new NATO-Russia agreement was identified in Paragraph 10 of their Final Communiqué as follows:

- the shared principles that will form the basis of our relationship;
- a broad set of areas of practical cooperation in particular in the political, military, economic, environmental, scientific, peacekeeping, armaments, nonproliferation, arms control and civil emergency planning fields;
 - mechanisms for regular and ad hoc consultations; and
 - mechanisms for military liaison and cooperation.

Principles

The opening principle in Section I of the Founding Act is that the NATO nations and Russia share an interest in the security of the Euro-Atlantic area. Russia, of course, borders on Middle Eastern and Asian countries as well. Despite occasional calls to make NATO a worldwide peacekeeping organization, the principles in the Founding Act make it clear that NATO-Russian peacekeeping operations do not extend beyond NATO’s traditional geographical sphere of concern in North America and Europe.

The *primary* role of the OSCE as the only pan-European security organization for regional security cooperation is stressed as a principle. NATO and Russia undertake to enhance the operational capabilities of the OSCE for regional security. Indeed, the parties commit to seeking the “widest possible cooperation among participating States of the OSCE” to create a common area of stability and security in Europe. The strengthening of the OSCE’s operational capabilities in peacekeeping is seen as consistent with the development of its Common and Comprehensive Security Model for Europe for the Twenty-First Century.

The representatives of NATO and Russia recognize that there are new threats, e.g., aggressive nationalism, terrorism, and territorial disputes. These new threats are different in kind, and not just in degree, from the threat of armed attack against the parties’ territories described in Articles V and VI of the North Atlantic Treaty. The response to these new risks and challenges will

likewise have to be entirely different. And while not mentioned in the Founding Act, it is predictable that a public debate is inevitable about the awkward question of whether NATO is properly constituted to deal with these new threats. The Founding Act is premised, of course, on the principle that NATO is the organization to meet the new threats.

The signatories reaffirm the principle that the UN Security Council retains the primary responsibility to maintain international peace and security. The unmistakable role envisioned for the OSCE is “as the inclusive and comprehensive organization for consultation, decision-making and cooperation in this area and as a regional arrangement under Chapter VIII of the United Nations Charter.”

A tangled web of relationships exists with respect to the prospective roles in regional peacekeeping for European entities such as the Western European Union (“WEU”) vis-à-vis NATO. And the Founding Act stops short of slamming the door on the WEU being authorized in the future to function as a Chapter VIII collective security entity with NATO or Russian participation. What the Founding Act is crystal clear on is that NATO-Russia peacekeeping operations will either be directly mandated by the Security Council or authorized by the OSCE as a Chapter VIII regional organization. This policy decision had to be a key inducement for obtaining a Russian sign-off on the Founding Act. One very good reason is that Russia has control over military operations with its veto in both the Security Council and in the OSCE (which, by the way, operates by consensus). The result is that NATO is politically bound by the express terms of the Founding Act not to engage in offensive use of force operations without Russian consent. In fairness, the Russian Federation is likewise bound. The veto point was emphasized differently by Presidents Clinton and Yeltsin, as each attempted to put the most favorable press spin for their respective audiences.

In the United States, domestic critics of the Administration strongly object to the concept of a Russian veto over NATO military operations. The fundamental distinction between self-defense and enforcement actions gets lost in the clamor. The Administration’s emphasis is on the non-binding nature of the Founding Act and the continued NATO self-defense role where unilateral action by NATO is legally justified. This aspect of the debate is true as far as it goes, but critics can still probably complain that the American public was given one impression on the veto issue and the Russian public quite another.²⁹ It would be difficult to deny, however, that the Russian veto over offensive measures by NATO was a major selling point within the walls of the Kremlin as a justification for signing the Founding Act. From a NATO

standpoint, this principle is nothing new. In December 1992, the NATO Council decided that the Alliance had a mandate to support peacekeeping activities of the United Nations and of the OSCE. As stressed above, the legal justification for out-of-area enforcement actions by NATO itself under the North Atlantic Treaty remains open to question. One practical possibility was to remove the authority of the WEU to engage in peacekeeping. However, the January 1994 NATO Summit endorsed the notion that Europe should develop a peacekeeping capacity. In addition, the principle was endorsed that the collective assets of the Atlantic Alliance would be made available for WEU operations. As of early 1998, the WEU continues in the early stages of developing its military operational capabilities and has taken credible actions in the Adriatic, on the Danube, and most recently in Albania. Interestingly, while the WEU could have based these actions on Articles 52 and 53 of Chapter VIII, Article 48 in Chapter VII was cited as a basis for its action. Russia is not, of course, a member of the WEU and thus the WEU was not a realistic option for selection as a Chapter VIII regional security organization in the Founding Act.

Another principle stated is that in implementing the Founding Act, NATO and Russia will observe in good faith their international legal obligations. In addition to the UN Charter, specific mention is made of the "Helsinki Final Act and subsequent OSCE documents, including the Charter of Paris and the documents adopted at the Lisbon OSCE Summit." The Charter of Paris was signed in November 1990 by the OSCE Heads of State or Government (including those for NATO and Russia). Among many other important matters in the Paris Charter was a vision for more structured co-operation among all participating States on security matters. Perhaps this is part of the reason why a specific reference was made to the Paris Charter in the Principles of the Founding Act. At the December 1996 OSCE Summit on European Security issues in Lisbon, a Declaration on a Common and Comprehensive Security Model for Europe for the Twenty-First Century was adopted. The mention in the Principles of the Lisbon Summit serves to remind the signatories that the NATO-Russia Founding Act is simply a part of a much larger scheme to create a more secure Europe.

A number of general principles, not all of which are directly pertinent to the focus of this essay on peacekeeping, were cited to achieve the aims of the Founding Act. One is the notion of an equal partnership between Russia and NATO. This is probably a very important status issue for the Russians, who are sensitive to the extreme about their diminished military might and are understandably concerned about the strength of their economy. This principle

recognizes that the Russian Federation is an equal on the political level with NATO. Acceptance of the principle by NATO was wise in that the only country outside NATO that could challenge NATO militarily is, in fact, Russia. This is something that American political figures tend to neglect in the debate about NATO expansion.

Another principle noted is the relationship between economic well-being and stability, as well as the role that democracy plays in fostering a secure environment. In this context, it is well worth recalling that democracies do not wage war on one another. Specific acknowledgment is made to the principle of refraining from the use of force contrary to the UN Charter and the Principles in the Helsinki Act. A related principle refers to respect for the territorial integrity of all States and the peoples' right of self-determination. Several principles then deal with the idea of mutual transparency, especially for defense policy and military doctrines. With a Russian physical presence at NATO Headquarters, one can envision considerable transparency on the part of NATO. It is less easy to see how NATO plans equal access to the formulation of Russian defense policy and military doctrines.

The last principle cited that is directly related to this study reads:

... support, on a case-by-case basis, of peacekeeping operations carried out under the authority of the UN Security Council or the responsibility of the OSCE.

The shared commitment of NATO and Russia to support peacekeeping operations (all of which are case by case) is not new. The NATO-led multinational force (IFOR) established to implement the military aspects of the Bosnia Peace Accord completed its work in December 1996 and was replaced by a smaller Stabilization Force (SFOR). The Russian contingent in IFOR numbered some 2,000 troops at its height and its participation in SFOR in late 1997 was around the 1,400 level.³⁰ Of the thirty-six nations with forces in Bosnia, the U.S. forces make up about 25 percent or 8,000 of the total allied ground force of 35,000.³¹

The Bosnia peacekeeping venture demonstrates that NATO and Russian military forces can be successfully integrated in the field in joint operations at least in a marginally hostile environment. Presidents Yeltsin and Clinton are also apparently able to resolve successfully reasonably difficult political problems. The Founding Act is a striking example of the willingness of these two world leaders to compromise towards one another's positions. But too much can be read into the ability of NATO and Russian forces to integrate militarily, based on the Bosnia experience. The modest successes to date do not

warrant jumping to the conclusion that joint NATO-Russia operations at the division levels can work successfully in a truly hostile environment. Peacekeeping operations based on host State consent with a token five percent Russian troop involvement is quite different from enforcement operations in actual combat situations where there might be a substantially large percentage of Russian troops. Many thorny interoperability problems are unresolved pertaining to command and control, intelligence sharing and the like. The professional military must guard against the pressure from political figures to make more of the Bosnia experiment than is there.

The NATO-Russia Permanent Joint Council

Section II of the Founding Act establishes yet another organization to deal with European security issues. The NATO-Russia Permanent Joint Council is to carry out the mandates in the Act and “to develop common approaches to European security and to political problems.” Considerable latitude is certainly implied by this latter phrase. The loose language of this mandate further demonstrates the bureaucratic evolution of NATO from a strictly self-defense military organization to a broader political organization of some kind. One is handicapped to comment in detail about the nature and even direction of this evolving entity at this stage, as there is no constituting treaty framework or a clearly articulated strategy of the end result being pursued. This is not necessarily unfavorable criticism because the current process has the virtue of being flexible and pragmatic. It may also be largely unavoidable when there is no agreed vision to follow.

In any event, the central objective of the new Council is to provide concrete means to enhance consultation and cooperation between the two sides. In appropriate instances, joint decisions and joint action may be taken on security issues. Again, the meaning of this language is vague. What is clear is that all of this is to be done without extending to the “internal matters of either NATO, NATO member States or Russia.” As expected, no definition is given of what is an internal matter and what is not. Presumably the decision to label a matter as internal or non-internal is an internal matter.

Former Secretary of State Warren Christopher and former Secretary of Defense William J. Perry recently acknowledged the value of the Act’s political provisions, but went on to opine that the “military provisions are less problematic and more important.”³² They see the object of the Act to create “permanent, institutionalized military relationships modeled on those forged in

Bosnia. . . .” And practical cooperation with the Russian military is seen as “more important than meetings and councils.”³³

Paragraph 3 of the section in the Act setting up the Council mechanism is consistent with the former Secretaries’ “action versus talk” emphasis. NATO and Russia are not only to identify but also to “pursue” as many opportunities for “joint action” as possible. The talk part is not neglected, however. The Permanent Joint Council is “the principal” venue of consultation in times of crisis or “for any other situation affecting peace and security.” Such a singular power of appointment must be taken seriously, for there can only be one entity that is “the principal” location for such weighty matters as discussion of an inter-party crisis or “any other” security situation. In particular, in addition to regular meetings, extraordinary meetings of the Council are to be promptly convened if a member perceives a “threat to its territorial integrity, political independence or security.”

The next paragraph is apparently directed toward less frenetic activities as reference is made to “the principles of reciprocity and transparency.” The notion is that through the on-going contacts in the Council, NATO and Russia will keep one another informed of their respective security threats and what each has in mind to do about them.

Sentence one in paragraph six of this mechanism section seems almost out of place. An objective observer might think the sentence is a statement of the obvious, except for the fact that the impression given by the Clinton administration to the public is that the statement represents an important accomplishment. The sentence reads:

Provisions of this Act do not provide NATO or Russia, in any way, with a right of veto over the actions of the other nor do they infringe upon or restrict the rights of NATO or Russia to independent decision-making and action.

The foregoing sentence is technically accurate: the Act is not a legally binding treaty and even if it were, there is no right of veto for Russia in the Founding Act as such. Russia would have a veto on actions if it were a Party to the North Atlantic Treaty; all NATO members have veto power since NATO operates by consensus. Likewise, all fifty-three members of the OSCE (including Russia) have a veto because that regional organization also operates by consensus. Perhaps the statement means that the above commitment, making the Permanent Joint Council “the principal” venue of consultation, does not “infringe” upon independent decision-making or action. One cannot help but wonder what the purpose of consultation is if it is not to “infringe” upon one’s actions? The plain language in the sentence is that neither Russia

nor NATO is given a veto in the Act. True enough, but as explained above, this is somewhat misleading with respect to peacekeeping operations. The reason is that Russia and three members of NATO are permanent members of the UN Security Council. All are also members of the OSCE. And as elaborated fully above, peacekeeping operations will be carried out only under the authority of the Security Council or the OSCE. The veto on peacekeeping operations is there for Russia; it was simply not provided by the Founding Act.

It would be equally accurate, but apparently not as politic, to stress that the inherent right of self-defense upon which NATO is founded and which is enjoyed by Russia and the United States alike, truly does not allow a veto by any other State or organization. That point is not in the Act but may belong there as much as the sentence quoted above. At the same time, there may be a host of non-use of force actions that could have been made subject to a veto and were not. If forbearance to do so is the reason to emphasize the lack of veto, then one cannot quibble. But the impression should not be left that there is no Russian veto on the non-self-defense use of force by NATO. Control over the use of force is what the Security Council is all about and is the hard core foundation for both the creation, as well as the continued relevance of the United Nations.

The schedule of regular meetings for the Permanent Joint Council (PJC) mirrors those of NATO: Foreign Ministers, Defense Ministers and Chiefs of Staff each meet twice annually, while ambassadors/NAC representatives and military representatives meet monthly. The possibility of Heads of State and Government meeting is not excluded but not expressly scheduled. The Council is authorized (like NATO) to establish either permanent or *ad hoc* committees or working groups and meetings of military experts may be convened, as appropriate. Given the priority on peacekeeping operations, it is predictable that a committee or working group will soon be established for that topic.

The Permanent Joint Council has, in principle, three joint chairs. One is the Secretary General of NATO and another is a representative of Russia. The third is a representative of one of the NATO member States on a rotation basis. The first Joint Council meeting held on 18 July 1997 was immediately presented with a disagreement over who should chair the meetings. A compromise was worked whereby the Russian Ambassador and Secretary General Javier Solana are permanent co-chairmen and a representative of the ambassadors from NATO's sixteen member States will rotate the other position for three-month periods.³⁴ The disinformation campaign in the West on the veto issue continued with the Agence France Presse reporting: "The council

enables Russia to take part in discussions on NATO policy without exercising a right of veto in its affairs, notably in its peace-keeping role.”³⁵ An American writer commented: “The NATO-Russia council is the centerpiece of the so-called Founding Act . . . conceived as a way to soothe Moscow’s hostility toward NATO’s eastward expansion plans and to encourage the Russians to play a more cooperative role in European security.”³⁶ He added: “. . . the United States and its allies insist Russia will only have a voice in, not a veto over, NATO policies.”³⁷

A significant bureaucratic innovation is also provided in this section of the Act: agreement is expressed that Russia will establish a Mission to NATO (not unlike a Mission to the United Nations) headed by a representative at the rank of Ambassador. Part of his Mission will include a senior Russian military representative and his staff. The possibility is provided for an appropriate NATO presence in Moscow, but is not spelled out.

Insofar as the candidates for NATO expansion are concerned, the Russians won the race to reach NATO Headquarters before they did. Once accepted, the status of the new members will, of course, be quite different. They will have the veto all NATO members enjoy and they will be full participants in all internal NATO meetings. Yet, if the UN Headquarters’ experience is an example, there will be few secrets that the Russians will not hear about now that they are at NATO Headquarters. That, in itself, may be the best reason of all for the Russians to have a physical presence in the heart of its former enemy’s military command center.

The agenda for regular sessions of the Permanent Joint Council are being set jointly by NATO and Russia. At this writing some organizational arrangements and rules of procedure for the Council have been worked out. At the inaugural meeting Council ambassadors held in Brussels on 11 September 1997, the exact purpose intended was achieved but the results were “very disagreeable.” Ambassador Vitaly Churkin, Russia’s representative to NATO, was strongly critical of “the aggressive new Western approach to the Bosnia peacekeeping mission. . . .” He reportedly said the “intolerable” use of force directed against the Bosnia Serbs was incompatible with the NATO-led peacekeeping force’s rules of engagement.³⁸ A senior NATO diplomat is quoted as saying this “was not a good omen for the future work of the NATO-Russia council.”³⁹ A different atmosphere apparently prevailed a few weeks later when the first meeting of the Council’s Foreign Ministers convened in New York. NATO’s Secretary General reported a successful launch of a new NATO-Russia “partnership.”⁴⁰ Indeed, he cited agreement on a work program which envisioned a range of NATO-Russia cooperation, including peacekeeping. He

highlighted discussion of the present situation in Bosnia and Herzegovina, as well as “the more general topic of peacekeeping operations.” He stressed that the “idea was to get the work moving and translate the words of the Founding Act into reality.”⁴¹ He also made a cryptic reference to the “potential for common action . . .” between Russia and NATO.⁴²

The text of the Founding Act specifies that the Permanent Joint Council will engage in three distinct activities. The first is to consult on any political or security issue both sides agree to discuss. This is an extraordinarily broad mandate with virtually no qualifications on topics, and is additional evidence of NATO’s turn towards being a political forum. The second activity is to develop “joint initiatives” on which NATO and Russia agree to speak or act in parallel. Again, there are no conditions and the wide latitude expressly given certainly includes planning for joint NATO-Russia peacekeeping operations. It is noteworthy that no distinction is made here between traditional blue helmet operations under the direct authority of the Secretary General and enforcement operations under the direct authority of the Security Council. Indications that the signatories had in mind joint NATO-Russia peacekeeping operations of all varieties are provided by the third category of activities cited. Once consensus (another term for veto) is reached between NATO and Russia, the Permanent Joint Council is authorized to make “joint decisions” and to take “joint actions” on a case-by-case (code in the Act for peacekeeping operations) basis. Pointed reference is then made to participation “in the planning and preparation of joint operations, including peacekeeping operations. . . .” Of course, the built-in reminder of the mutual veto is highlighted again with the statement that the peacekeeping operations must be “under the authority of the UN Security Council or the responsibility of the OSCE.” And just to be sure that there is no room for misunderstanding, a sentence is added that any actions, i.e., use of force undertaken by NATO or Russia together or separately, must be pursuant to the UN Charter and the OSCE governing principles.

The unmistakable impression gained from examining the “three distinct activities” identified in Section II of the Act is that a priority activity of the Council is to discuss, plan and present to higher authority, joint NATO-Russia peacekeeping operations.

Areas for Consultation and Cooperation

Planning for joint peacekeeping operations is, of course, only one of many areas upon which NATO and Russia are expected to focus in building a new

cooperative relationship. In Section III of the Founding Act, the signatories are to consult and strive to cooperate, not only across a wide spectrum of security issues in the Euro-Atlantic area, but also on concrete crises, including the contributions of NATO and Russia to the resolution thereof. In the realm of conflict prevention, the roles of the United Nations and the OSCE are once again expressly referenced. Significantly, no mention is made in this section of a role for the WEU or, for that matter, any other European organization in conflict prevention or crisis management. The sides are to discuss “joint operations, including peacekeeping operations, on a case-by-case basis under the authority of the UN Security Council or the responsibility of the OSCE. . . .” A specific reference is made to NATO-Russia “early” participation if Combined Joint Task Forces (CJTF) are used in peacekeeping operations.

The CJTF concept arose out of the 1994 NATO Summit in Brussels to provide a mechanism for rapid deployment of peacekeepers. Under the political umbrella of the North Atlantic Council, the NATO members willing to lead and support CJTFs undertake operations such as those restoring stability in Albania in 1997. The Founding Act clearly provides a political and legal framework within which NATO and Russia could develop and plan joint initiatives utilizing the CJTF approach. Russia is already participating in the Euro-Atlantic Partnership Council and in the Partnership for Peace program. The Permanent Joint Council, however, is an independent springboard to prepare joint NATO-Russia peacekeeping operations.

One of the first steps that NATO and Russia must take in the preliminary planning for possible joint peacekeeping operations is to exchange information on each side’s existing approaches to military operations. The experience gained on each side from the ongoing peacekeeping operation in Bosnia, despite the tendency to puff too much about its success, is obviously invaluable. Multinational training exercises such as the week-long peacekeeping exercise in Kazakhstan, led by the United States in mid-September 1997 with troops from Russia and five other nations, generated additional knowledge and experience indispensable for planning future NATO-Russia joint operations.⁴³ This latter exercise, sponsored under the Partnership for Peace program, reportedly had heavy involvement by Russian military officers in the planning processes—a most welcome development.⁴⁴ The framework in the Founding Act explicitly targets exchanges between NATO and Russia on strategy, defense policy, and military doctrine. Exchanging information and conducting joint exercises are necessary, in part, because they help identify similarities as well as expose differences in military approaches and doctrine. NATO has had many decades to work on promoting commonality among its members.

Establishing NATO-Russian commonality will take time, money, and tolerance on both sides. This is anticipated in the Founding Act, in which the PJC is tasked to coordinate an expanded program of cooperation between their respective military establishments.

Political-Military Matters

Section IV of the Founding Act is addressed to broad political-military issues that are part of the context within which NATO-Russia joint peacekeeping operations must fit. The first important declaration in this section is that current NATO members state that they are not planning to deploy nuclear weapons or to establish nuclear weapon storage sites on the territories of new members. Indeed, no need is seen to change any aspect of NATO's nuclear policy by the addition of new members. The carefully crafted text stops short of a categorical statement that there are no circumstances under which deployment of nuclear weapons or their storage could occur in the territory of new members of NATO. While the Russians undoubtedly pressed for such categorical assurances, NATO leaders went a long way toward assuaging Russian fears that expansion was moving NATO's nuclear capabilities closer to Moscow.

The next issue tackled was adapting the CFE Treaty to the changed political and military circumstances in Europe. The urgency of this issue was recognized by an undertaking to conclude "an adaptation agreement as expeditiously as possible. . . ." The first step for NATO members and the other State Parties to the CFE Treaty is to conclude a Framework Agreement with the basic elements of an adapted CFE Treaty. At the Madrid Summit in July 1997, it was announced that NATO had advanced a comprehensive proposal for adaptation of the CFE Treaty on the basis of a revised Treaty structure of national and territorial military equipment ceilings. This was consistent with NATO's members previously stated intention to reduce significantly the future aggregate national ceilings for Treaty-Limited Equipment. These are to be codified as binding limits in the adapted Treaty, reviewed in 2001 and at five-year intervals thereafter. In this Section of the Founding Act, NATO and Russia encourage the Parties to the CFE Treaty to consider reductions in their CFE equipment entitlements to achieve lower equipment levels. The member States of NATO and Russia "commit" to exercising restraint with respect to forces and deployments to avoid diminishing the security environment. They are, in addition, to develop measures to prevent threatening build-up of conventional forces in agreed regions of Europe, to include "Central and

Eastern Europe.” Consultations on the evolution of the conventional force postures are to occur “in the framework of the Permanent Joint Council.”⁴⁵

To ensure that Russia understands its intent with respect to military activities in the future, NATO reiterates its modern approach to military operations in the new European security environment. A cautionary note is in order after the foregoing discussion directed at confidence-building measures and the reduction of conventional forces. The reminder required is that NATO still has a military mission to perform, which may require responding to threats of aggression or peacekeeping assignments. Whether defending the territory of member States or conducting military exercises, NATO stresses that it must ensure “interoperability, integration, and capability for reinforcement rather than by additional permanent stationing of substantial combat forces.” This strategy is based on the premise that NATO now faces a multiplicity of smaller threats as contrasted with the monolithic threat of the Cold War era. It is also consistent with the perceived need for combined joint task forces that are more rapidly deployable than are larger, more static forces. Lastly, the approach is compatible with the prevailing political sentiment among NATO members to spend a lower percentage of their gross national product on military defense and to make up the difference by multinational burden-sharing through combined joint forces.⁴⁶ While infrastructure compatible with this new approach must still be developed, the hope is that through agreed transparency measures, such reinforcements will be properly understood. Russia is to exercise “similar restraint in its conventional force deployments in Europe.”

One of the four main points cited by the Ministers at the 1996 Council meeting in Brussels for inclusion in the new NATO-Russia relationship, was to establish mechanisms for military liaison and cooperation. This was implemented through the Permanent Joint Council’s expanding consultations and cooperation via an “enhanced dialogue between the senior military authorities of NATO and its member States and of Russia.” Both sides are to significantly expand military activities and practical cooperation “at all levels.” This enhanced military-to-military dialogue includes regularly scheduled reciprocal briefings on mutual military doctrine, strategy, and resultant force structure. Specific reference is also made to discussing joint exercises and training. Broad authority is given in the Act for NATO and Russia to establish military liaison missions at various levels.

The value of practical activities and direct cooperation, which was highlighted by former Secretaries Christopher and Perry earlier in this essay, is the unmistakable focus of the last paragraph in the Founding Act. The deliberate placement of this point at the very end of the Act serves to

emphasize rather than to diminish the importance of the paragraph—it is no afterthought. NATO and Russia’s respective military authorities are directed to “explore the further development of a concept for joint NATO-Russia peacekeeping operations,” building upon “the positive experience of working together in Bosnia and Herzegovina.” The lessons from the peacekeeping operations there are to be “used in the establishment of Combined Joint Task Forces.” Of course, agreement on a new command structure to enable all Allies to participate fully will have to emerge if the CJTF concept is to be advanced. The plans must be flexible enough to allow for the preparation and conduct of WEU-led operations as well.

The Ministers meeting held under NAC auspices at the end of 1997 also stressed the importance of practical cooperation under the Permanent Joint Council. NATO and Russia were said to have made significant progress on security issues, including the situation in Bosnia and the conduct of peacekeeping operations. In this latter instance, encouraging progress was cited in the working group on peacekeeping. Again, reference was made to “opening a new era in European security relations” and the “potential of the Founding Act.”⁴⁷

The most important message in the Founding Act, that is reinforced by the highest authorities in the “NATO 16 plus Russia 1,” is that their respective military forces are directed to become allies rather than to continue as adversaries. The implications of such a profound change for the military cultures of the respective sides reach well beyond NATO-Russia joint peacekeeping operations. But that is evidently where the Heads of State expect to start the process of military integration. As we have seen in this study, this is to occur within the framework in the Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation. It remains to be seen how much is potential and how much is practical. The reader is reminded that a wounded bear is far more dangerous than a healthy one. And it is no overstatement to end this essay with the sobering observation that global security in the twenty-first century may hinge upon the success or failure of the grand experiment outlined in the Act.

Notes

1. Remarks by President William Clinton, French President Jacques Chirac, Russian President Boris Yeltsin, and NATO Secretary General Javier Solana at NATO-Russia Founding Act Signing Ceremony, White House Press Release, May 27, 1997, at 5.

2. *Id.* at 7.

3. Press Briefing by Mike McCurry, White House Press Release, May 27, 1997, at 2. [hereinafter Press Briefing] An editorial in the December 4, 1997, Moscow Times read: "There he goes again. President Boris Yeltsin on Tuesday made another startling gesture on nuclear weapons during his trip to Sweden, only to have it immediately downplayed by his staff. Yeltsin made people sit up straight in their chair when he offered to cut nuclear warheads by a third. But only for a moment. As with his earlier offer to no longer target the West with nuclear weapons, which turned out to be something that had already happened, it turns out there's not a lot of substance behind the latest offer."

4. *Id.*, at 6. President Yeltsin presented the Founding Act to the Duma where it was adopted. This suggests that the Russians view the status of the Act as being in the nature of a treaty carrying binding legal obligations. For a discussion of this issue and other political aspects of the Act, see Karl-Heinz Kamp, *The NATO-Russia Founding Act Trojan Horse or Milestone of Reconciliation?* AUSSENPOLITIK, IV/1997, at 315–324.

5. D.P. O'CONNELL, *INTERNATIONAL LAW* 213 (1965).

6. 3 DEPT. OF STATE, DISPATCH 29 (July 20, 1992). Both the United States and Russia are Participating States in this Act which expressly refers to the "obligations" in the Treaty on Conventional Armed Forces in Europe (CFE Treaty) of November 19, 1990.

7. Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975. "This document which was signed by thirty-five nations participating in the Conference, has no legally binding effect." JOHN NORTON MOORE, ET AL., *NATIONAL SECURITY LAW DOCUMENTS* 529 (1995).

8. O'CONNELL, *supra* note 5, at 214.

9. Vienna Convention on the Law of Treaties, May 23, 1969 U.N. Doc. A/CONF. 39/27 (1969), 8 I.L.M. 679 (1969). [hereinafter Vienna Convention]

10. *Id.*, art. 2, para. 2.

11. II Y.B. INT'L L. COMM. 196 (1966).

12. 1 RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES 196 (1986).

13. *Id.*, at 198.

14. Vienna Convention, *supra* note 9, art. 7.

15. Advisory Opinion on Treatment of Polish Nationals in Danzig, P.C.I.J., ser. A/B, No. 44 at 22 (1932).

16. Vienna Convention, *supra* note 9, art. 31 (1).

17. *Id.*, art. 32.

18. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964 [hereinafter NATO Treaty]. The definition of the territories to which Article 5 applies was revised by Article 2 of the Protocol to the North Atlantic Treaty on the accession of Greece and Turkey and by the Protocols signed on the accession of the Federal Republic of Germany and of Spain.

19. *Id.*, art. 6. The Algerian departments of France no longer exist and the fact of their mention in the North Atlantic Treaty is irrelevant.

20. Senator Arthur Vandenberg consulted with the State Department about the constitutionality of joining the Atlantic Alliance. He drew up a Resolution which, *inter alia*, made clear the determination of the United States Government "to exercise the right of individual or collective self-defense under Article 51. . . ." The text of the Vandenberg Resolution is reproduced in "NATO Basic Documents" published by the NATO Information Service.

21. Chapter 6 of the UN Charter is entitled Pacific Settlement of Disputes. Chapter 7 is entitled Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression. The Charter as written makes no references whatsoever to peacekeeping activities.

Accordingly, when this gap became apparent to the members of the UN, this phrase came into common usage to characterize peacekeeping activities as falling somewhere between Chapter 6 and Chapter 7.

22. NATO Treaty, *supra* note 18, art. 7.

23. A stalemate occurred in the Security Council between the western powers and the Soviet Union, as the permanent members have a right to veto actions. When it became evident that the UN was unable to discharge its responsibilities due to this unfortunate fallout from the Cold War, the General Assembly exercised its prerogative to make recommendations on virtually any matter that is of interest to it. Accordingly, as a response to the deadlock over the Korean War, the General Assembly passed a Uniting for Peace Resolution that urged all members to take actions with respect to threats to international peace and security by enacting a General Assembly resolution that was a substitution for the Charter-provided Security Council resolution.

24. Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation, NATO-Russian Summit, Paris, May 72, 1997 [hereinafter Founding Act]. See <<http://www.nato.int/docu/comm/m970527/uk-text.htm>> for text of Act.

25. This is the successor to the Implementation Force operations enforcing the Dayton Peace Accords.

26. NATO Partnership for Peace: Invitation and Framework Document, *reprinted* as Appendix C in James W. Morrison, NATO Expansion and Alternative Future Security Alignments 138 (McNair Paper No. 40, 1995).

27. *Id.*

28. Founding Act, *supra* note 22, at 2.

29. See Press Briefing, *supra* note 3, at 3, for the following exchange at the White House Press Briefing on the day the Founding Act was signed:

Q. . . . when the NATO agreement was announced there seemed to be some confusion at least by President Yeltsin about what exactly Russia was allowed to do in terms of a veto. Do you feel like he's kind of backed off of that and has maybe come to accept your definition?

Mr. McCurry. I don't know if there was confusion. I think he was presenting the Founding Act in a way that he thought would engender support among the Russian people. And you now all have [sic] Founding Act, so you know what's in it.

30. *Moscow Warns NATO on Bosnia*, WASH. POST, Sept. 12, 1997, at 1, 12. [hereafter *Moscow Warns*]

31. Interview on Aug. 18, 1997 with recently retired former military commander of NATO, General George A. Joulwan, ARMY TIMES, Sept. 1, 1997, at 6. His percentages work out better using another report that put the figures at "31,000 soldiers from 30 nations."

32. N.Y. TIMES, Oct. 21, 1997, as reported in the EARLY BIRD published daily by the U.S. Dep't. of Defense, at 12.

33. *Id.*

34. International News Release, July 18, 1997, Agence France Press.

35. *Id.*, at 2.

36. William Drozdiak, WASH. POST, July 19, 1997.

37. *Id.*

38. *Moscow Warns*, *supra*, note 27.

39. *Id.*

40. NATO's Role in Building Cooperative Security in Europe and Beyond, Remarks by the Secretary General of NATO, Tokyo, Japan, Oct. 15, 1997, at 4.

41. *Id.*

42. *Id.* at 5.

43. U.S. Leads Peacekeeping Drill in Kazakstan, WASH. POST, Sept. 15, 1997, at 17.

44. *Id.*

45. The Head of Policy Planning and Speech Writing for NATO, John Barret, commented, *inter alia*, at a briefing in Moscow about the substantive differences between the NATO-Russia Founding Act and the NATO-Ukraine Charter. He noted: "the NATO-Russia Act has a permanent joint council . . . the Act foresees joint decision-making and the possibility of joint action of NATO and Russia." Barret also predicted that issues such as the situation in Bosnia would be part of the PJC consultations. Official Kremlin International News Broadcast, July 15, 1997.

46. The Defense Department's total costs for peacekeeping operations in and around Bosnia are estimated by the Government Accounting Office to be \$6.4 billion through June 1998. After June 1998, the stabilization force mandate expires and the NATO-led operations are in the process of formulating a revised mission which will entail revised costs. INSIDE THE NAVY, February 16, 1998.

47. Final Communiqué, Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, Dec. 16, 1997.

VIII

Guarding the Coast: Alien Migrant Interdiction Operations at Sea

Gary W. Palmer

THE INVOLVEMENT OF THE COAST GUARD in immigration matters is extensive. Its wide variety of roles and missions includes:

- Protecting the safety of life at sea, regardless of immigration status;
- Preventing the entry of undocumented migrants into the United States through at-sea interdiction;
- Facilitating parole into the United States by the Immigration and Naturalization Service (INS) for prosecution, or turnover to another nation with criminal jurisdiction over the matter, of aliens found committing criminal acts at sea;
- Seizing conveyances and arresting alien smugglers, and gathering evidence in alien smuggling cases to help ensure the successful criminal prosecution of those involved, and/or civil forfeiture of their vessel;
- Inspecting vessels and facilities subject to Coast Guard jurisdiction in cooperation with the INS to ensure that any aliens being employed are engaged in activities consistent with their immigration status;

- Detaining aliens, when encountered on vessels subject to Coast Guard jurisdiction, who have entered the United States illegally, until disposition instructions are received from the INS; and
- Complying with appropriate procedures for handling claims to refugee status and requests for political asylum made during the course of Coast Guard operations.

Despite these roles and missions, the Coast Guard is neither the architect of national immigration policy nor even the lead federal agency for immigration law enforcement. However, the task of enforcing U.S. immigration laws at sea rests almost exclusively with the Coast Guard. This paper first surveys the basic legal authority for Coast Guard interdiction and repatriation of illegal migrants encountered at sea, then looks at how that legal authority is exercised within the factual context of several different types of alien migrant interdiction operations.

Basic Legal Authority

On 14 August 1949, Title 14 of the United States Code was enacted into positive law.¹ For the Coast Guard, a key provision was 14 United States Code (USC) §89, which authorized the Coast Guard to

. . . make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the U.S. has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or operation of any law, of the United States, address inquiries to those onboard, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. . . .²

14 USC §89 was initially enacted³ in response to the decision of the Supreme Court in *Maul v. United States*,⁴ which affirmed the jurisdiction of the Coast Guard over U.S. flag vessels under former §3072 of the Revised Statutes for violations of laws respecting the revenue. However, Justice Brandeis, in his concurring opinion, expressed his concern that more explicit statutory authority would be required to authorize seizures of vessels for violations of laws other than those pertaining to collection of revenues. Congress responded to that suggestion by adopting essentially the language that exists in 14 USC §89(a) today.

While 14 USC §89 articulates the extent of the Coast Guard's law enforcement authority and who may exercise it, 14 USC §2 defines the Coast Guard's law enforcement mission in more general terms. It states:

The Coast Guard shall enforce or assist in the enforcement of all applicable federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; . . .

By virtue of the powers conferred by this statute and 14 USC §89, the Coast Guard is the principal federal maritime law enforcement agency of the United States. It is in this role that the Coast Guard performs the mission of alien migrant interdiction operations at sea.

Despite the broad statutory authority conferred on the Coast Guard by 14 USC the Supreme Court has held that “. . . an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”⁵ And, under both Article 6 of the 1958 Convention on the High Seas (High Seas Convention)⁶ and Article 92 of the 1982 United Nations Convention on the Law of the Sea (LOS Convention),⁷ a vessel on the high seas is subject solely to the exclusive jurisdiction of the flag state. While the United States is a party only to the High Seas Convention, these provisions in both treaties confirm existing maritime law and practice and are a codification of existing customary international law.⁸

There are, however, several exceptions to the principle of exclusive flag state jurisdiction. The most commonly relied upon exception permits a warship to board any vessel not entitled to complete immunity if there are reasonable grounds to suspect it is engaged in piracy, slave trading, unauthorized broadcasting, or that it is a stateless vessel or of the same nationality as the warship.⁹ This is known as the “right of visit.” It is a limited exercise of authority solely for the purpose of verification of the aforementioned circumstances. Unless the vessel is determined to be the same nationality as the warship, a stateless vessel, or a vessel engaged in piracy (or other universal crimes), any further exercise of complete criminal jurisdiction requires a separate, independent basis.¹⁰ In immigration matters, this normally is found in an affirmative waiver of exclusive jurisdiction by the flag state and express consent by the flag state to an exercise of jurisdiction by the United States.¹¹

This waiver and consent to jurisdiction may be sought and given on a case-by-case basis or take the form of a standing special arrangement pursuant to treaty, exchange of diplomatic notes, or executive agreement.

In October 1994, President Clinton forwarded the 1982 United Nations Convention on the Law of the Sea to the Senate for advice and consent. In so doing, the President recognized reliance on flag state consent as a basis for jurisdiction in immigration matters by stating:

... the United States and other members of the international community have developed procedures for resolving problems that have arisen in certain contexts, including drug smuggling, illegal immigration and fishing, when States are unable or unwilling to exercise responsibility over vessels flying their flag. These procedures, several of which are contained in international agreements, typically seek to ensure the flag state gives expeditious permission to other States for the purpose of boarding, inspection, and where appropriate, taking law enforcement action with respect to its vessels (emphasis added).¹²

Thus, 14 USC §89 does not authorize the Coast Guard to conduct searches and seizures of foreign flag vessels carrying illegal migrants on the high seas without the consent of the flag state.¹³ However, if this consent is obtained, the Coast Guard may then stop the vessel on the high seas, search for illegal migrants, and take appropriate action consistent with United States law.

Under 14 USC §89(b), Coast Guard officers acting pursuant to their general law enforcement authority are deemed to be agents of those executive agencies charged with administration of a particular law. When conducting alien migrant interdiction operations, the Coast Guard relies on this agency theory to enforce compliance with the Immigration and Nationality Act on behalf of the INS and the Attorney General. More specifically, the Coast Guard enforces 8 USC §1185(a)(1), which states, *inter alia*, that it is unlawful for an alien to "... enter ... or attempt to ... enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may subscribe." The Coast Guard also enforces the provisions of 8 USC §1324 which make it a crime to knowingly bring, or attempt to bring, an alien into the United States at other than a designated port of entry.

Coast Guard interdiction policy is determined largely by national security goals and Presidential directives. The current strategy calls for focusing United States maritime interdiction operations as far at sea as possible. The manner in which these operations are conducted, however, is dependent upon a combination of many factors. The primary ones are: (1) the nature and

magnitude of the threat, (2) the type and number of resources available, and (3) the applicable law.

The remainder of this article examines the application of both the law and Coast Guard resources to specific migrant interdiction operations. It focuses on Coast Guard efforts to interdict Haitian, Cuban, Dominican, and Chinese migrants attempting to enter the United States illegally in overloaded and unseaworthy craft. The peculiar difficulties of each type of interdiction are illustrated with factual examples. Finally, it attempts to show how the nature and magnitude of migrant activity, as well as Coast Guard interdiction operations, is directly influenced by changes in law and policy.

The Immigration and Nationality Act of 1952

"It is undoubtedly within the power of the Federal Government to exclude aliens from the country."¹⁴ However, prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,¹⁵ aliens who resided in the United States or arrived at the border were accorded certain procedural rights under the Immigration and Nationality Act of 1952 (INA)¹⁶ before being excluded or deported. Those residing illegally in the United States were subject to deportation only after a formal evidentiary hearing.¹⁷ Aliens arriving at "ports of the United States" who did not appear to the examining immigration officer to be clearly entitled to land were subject to a less formal exclusion proceeding by which they too were eventually subject to removal.¹⁸ Whether an alien is "excluded" or "deported" turns upon whether they have "entered" the United States.¹⁹ Aliens who have made an "entry" are entitled to deportation proceedings, while those who are seeking admission but who have not made an "entry" are afforded only an exclusion proceeding.

Other aliens could be prevented from entry by Executive actions that did not trigger any procedural rights. In *Haitian Refugee Center, Inc. v. Gracey*, the District court stated:

The Immigration and Nationality Act has established procedures for the exclusion of aliens, including the entitlement to a hearing. See 8 USC §1226. Those rights, however, are reserved for aliens arriving "by water or air at any port within the United States from any place outside the United States." *Id.* . . . Again, because those "exclusion or deportation" proceedings are restricted to aliens arriving "at any port within the United States," 8 USC §1221, it is clear that the interdicted Haitians are entitled to none of these statutorily-created procedural rights, including the right to counsel.²⁰

In either a deportation or exclusion proceeding, an alien could seek asylum as a political refugee.²¹ Section 243(h)(1) of the INA provided:

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in any such country on account of race, religion, nationality, membership in a particular social group, or political opinion.²²

Congress thereby intended²³ to incorporate the provisions of the 1951 Convention on the Status of Refugees²⁴ as amended by the 1967 Protocol Relating to the Status of Refugees (the Convention),²⁵ Article 33 of which provides:

Article 33 - Prohibition of expulsion or return ('refoulement')

1. No contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country *in which he is*, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country (emphasis added).

The text of Article 33 does not apply by its terms to actions taken by a country beyond its borders. In fact, the language of Article 33.2 suggests that an alien entitled to the benefit of Article 33.1 must be located within the territory of a contracting state. As a result, the Supreme Court determined that since INA §243 was intended to incorporate the provisions of the Convention, and neither suggested any extraterritorial application, §243 applied only in the context of the domestic procedures by which the Attorney General determined whether to deport or exclude an alien.²⁶

Since 1980, the Coast Guard has been involved in operations to prevent illegal migrants from entering the United States and, thereby, from implicating any statutorily-created procedural entitlements.

Haitian Migrant Interdiction Operations

The near total collapse of the Haitian economy in the late 1970s and early 1980s under the repressive regime of then "President-for-Life" Jean Claude

Duvalier resulted in a flood of economic migrants from Haiti attempting to reach the United States by boat.²⁷

In response, President Reagan delegated express authority to the Coast Guard to interdict and return illegal aliens on the high seas. He did this by promulgating Executive Order 12,324,²⁸ which was signed in September of 1981 in response to what he characterized as a “serious national problem” of “continuing illegal migration by sea.”²⁹ It was promulgated pursuant to the authority of the President under 8 USC §1182(f) and his inherent authority under the foreign affairs power of the Constitution³⁰ to suspend entry or impose restrictions on entry of aliens. The Order directed the Secretary of Transportation to issue instructions to the Coast Guard to enforce the suspension of the entry of undocumented aliens into the United States by sea. It also authorized the Coast Guard to interdict certain defined vessels for this purpose if they were suspected of being involved in the “irregular transport of people,”³¹ or other violations of United States law on the high seas (including, but not limited to the INA), and to return the vessel and transport its passengers to the country from which they came. The defined vessels included “[v]essels of foreign nations with whom [the United States has] arrangements authorizing the United States to stop and board such vessels.”³² By its terms, the Executive Order authorized these actions only outside the territorial waters of the United States.

The United States and Haiti had entered into a bilateral agreement on 23 September 1981,³³ six days before Executive Order 12,324 was signed. That agreement applied to private Haitian vessels on the high seas when there was reason to believe that such vessels were involved in the irregular carriage of passengers outbound from Haiti. It gave the United States permission to board such vessels to determine their registry, condition, and destination, as well as the status of those on board. When the circumstances suggested that a violation of U.S. immigration laws had been or was being committed, the vessel and persons on board could be detained and returned to Haiti upon prior notification to the Haitian government. Haiti also gave assurances that interdicted Haitians would not be prosecuted for illegal departure.

Interdiction of migrants at sea may be accomplished in departure, transit, or arrival zones. However, forward deployment of available Coast Guard resources, as opposed to waiting to interdict at or near landfall in the United States, is preferred for several reasons. First, the vessels used by migrants are usually grossly overloaded, unseaworthy, and incapable of making the 700-mile trip from Haiti to the United States without risking substantial loss of life. Second, aliens residing illegally in the United States or arriving at the border

were entitled under former §243(h) of the INA to a deportation or exclusion hearing. The differences between exclusion and deportation, and the varying procedural protections attached to each, depended upon whether the alien had made an “entry” into the United States.³⁴ Aliens making an entry were entitled to deportation proceedings. Those seeking admission upon arrival, but prior to “entry,”³⁵ could have their status determined at an exclusion proceeding. Since §243 did not by its terms have extraterritorial application,³⁶ migrants interdicted at sea were not afforded access to either of these processes.³⁷

The best reason to interdict migrants at sea, however, is that it saves lives. Without the nearly constant presence of a Coast Guard cutter in relative proximity to the territorial sea of Haiti, many migrants bound for the United States would die. Haitian migrant vessels are typically crude, handmade, wooden-hulled vessels.³⁸ Primarily, they are lateen or sloop-rigged sailing vessels of 30-50 feet in length, or more substantial double-decked, wooden-hulled freighters, 50-80 feet in length, with high, upswept bows, and a large deck house aft. The latter are generally powered by unreliable engines prone to mechanical failure. Most do not carry charts, compass, or navigational instruments of any kind. Navigation is based primarily on following the prevailing winds, wave patterns, and changes in water color along the Bahama Bank until the loom of light from Miami is seen on the night horizon. Due to the large number of people on board (some may carry as many as six to eight persons for every foot of deck length) and complete lack of sanitary facilities, conditions on the vessels are typically appalling. Cooking, if any, may be done over open charcoal fires, and some vessels even carry live goats as provisions. The vessels usually have little freeboard due to their overloaded condition, and constant flooding results.

After the migrants are removed, the vessels normally cannot be towed, due to either their physical condition or the presence of large numbers of migrants on the Coast Guard cutter. Rather than be left adrift as derelicts, where they could constitute a potentially deadly hazard to navigation, these vessels are usually destroyed. The vessels are at times unsinkable with gunfire or ramming, because the inherent natural buoyancy of their wooden construction often keeps them floating just below the surface despite the infliction of major damage. As a result, most cutters resort to burning the vessels to the waterline, then breaking up the remains by ramming or other means to minimize the size of the debris.

Executive Order 12,324 expressly prohibited the return of any refugee without their consent.³⁹ As a result, migrants interdicted on the high seas

pursuant to the Executive Order had to be screened for colorable claims to refugee status. For that purpose, Coast Guard cutters on patrol in the Windward Passage between Cuba and Haiti initially had INS agents and Creole-speaking interpreters assigned. When a cutter came upon an overloaded and unseaworthy Haitian vessel bound for the United States, the migrants were taken on board the cutter, given an abbreviated medical examination, issued a blanket, and fed a meal (typically of beans and rice). Due to space limitations, the migrants were normally kept on the flight deck, forecastle, or fantail of the cutter.⁴⁰ The cutter's crew would attempt to rig awnings to shelter the migrants as best they could from the effects of wind, weather, and the hot Caribbean sun beating on the steel decks of the cutter. The cutters also carried or improvised portable toilets, and otherwise attempted to treat the migrants with as much dignity as possible.

Under Executive Order 12,324, the migrants were individually interviewed by INS agents while onboard the cutter to determine if any had potentially valid claims to refugee status. This process often took days. While their status was being decided, the cutter remained at sea and out of sight of land. As time wore on, the migrants sometimes became impatient. With overcrowding, discontent, boredom, and the prospect of an imminent return to Haiti rather than the promise of arrival in Miami, some migrants even became belligerent.⁴¹ Disturbances sometimes broke out on Coast Guard cutters that in a few instances had to be quelled through the use of physical restraints, fire hoses, or chemical agents such as CURB 60⁴² or pepper spray.

After the interview process was complete, those who were determined to be economic migrants were "screened out" and repatriated. Repatriations usually took place dockside in Port au Prince, where the Haitians were turned over to the Red Cross. Those who made a colorable claim of status as a political refugee were "screened in" and transported to the United States so that they could file a formal application for political asylum.

Between 1981 and 1991, approximately 25,000 Haitian migrants were interdicted by the Coast Guard. Then, on 30 September 1991, a military coup succeeded in overthrowing the Aristide government. In response to the subsequent killing and torture of hundreds of Haitians who opposed the military regime, a flood of migrants bound for the United States soon overwhelmed both the existing operational posture of the Coast Guard and the ability of the INS to screen the migrants for potential refugee status as required by Executive Order 12,324.

Executive Order 12,324 was superseded by Executive Order 12,807 on May 23, 1992.⁴³ The primary difference between the two was that Executive Order

12,807 no longer contained a requirement to screen migrants interdicted at sea for refugee status. In addressing a challenge to the new Executive Order on this ground, the Supreme Court said:

During the six months after October 1991, the Coast Guard interdicted over 34,000 Haitians. Because so many interdicted Haitians could not be safely processed on Coast Guard cutters, the Department of Defense established temporary facilities at the United States Naval Base at Guantanamo Bay, Cuba, to accommodate them during the screening process. Those temporary facilities, however, had a capacity of only about 12,500 persons. In the first three weeks of May 1992, the Coast Guard intercepted 127 vessels (many of which were considered unseaworthy, overcrowded, and unsafe); those vessels carried 10,497 undocumented aliens. On May 22, 1992, the United States Navy determined that no additional migrants could safely be accommodated at Guantanamo.

With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders and offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees. In the judgment of the President's advisors, the first choice would not only have defeated the original purpose of the program (controlling illegal immigration), but also would have impeded diplomatic efforts to restore democratic government in Haiti and would have posed a life threatening danger to thousands of persons embarking on long voyages in dangerous crafts. The second choice would have advocated those policies but deprived the fleeing Haitians of any screening process. . . .

On May 23, 1992, President Bush adopted the second choice. After assuming office, President Clinton decided not to modify that order; it remains in effect today.⁴⁴

The terms of Executive Order 12,807 provided for the repatriation of undocumented aliens without the benefit of any screening process. It also stated that the "non-refoulement"⁴⁵ obligations of the United States under Article 33 of the United Nations Convention Relating to the Status of Refugees⁴⁶ do not extend to persons located outside the United States. The Executive Order again directed the Secretary of Transportation to issue appropriate instructions to the Coast Guard to enforce the suspension of the entry of undocumented aliens by sea and to interdict defined vessels carrying

such aliens. These instructions were to include directives to “return the vessel and its passengers to the country from which it came, *or to another country . . .* provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.”⁴⁷

There have been a number of legal challenges to the Coast Guard’s interdiction and repatriation of Haitian migrants at sea under both Executive Orders. In 1985, the District Court for the District of Columbia denied such a challenge to Executive Order 12,324, finding that §243(h) of the INA applied only to those Haitians who were already in the United States.⁴⁸ The next challenge came in 1991, alleging that the Government had failed to establish and implement adequate procedures to protect Haitians who qualified for asylum. The Eleventh Circuit Court of Appeals held that since Executive Order 12,324 did not limit the discretion of INS officials, migrants interdicted at sea could not obtain judicial review of INS decisions.⁴⁹ That court also held that the INA did not apply extra-territorially.

President Bush’s promulgation of Executive Order 12,807 precipitated another round of legal challenges. The Supreme Court resolved those challenges by holding that repatriating migrants to Haiti without first determining whether they qualified as refugees was not prohibited by either §243 of the INA or Article 33 of the United Nations Convention Relating to the Status of Refugees.⁵⁰ The court found that since neither of those provisions had extra-territorial application, migrants interdicted at sea were not entitled to either deportation or exclusion hearings. Therefore, there is nothing in domestic or international law which prevents the President or the Attorney General from involuntarily repatriating undocumented aliens interdicted at sea.⁵¹

During fiscal year 1992 the Coast Guard interdicted 37,618 Haitian migrants. In response to the Haitian exodus, Operation Able Manner commenced on 15 June 1993 and was, at that time, the largest single peacetime operation in the history of the Coast Guard. It involved virtually every Coast Guard unit along the Atlantic and Gulf coasts. Today, Haitian migration has stabilized at an average of about 150 to 300 migrants a month, with occasional peaks in excess of those amounts. On 24 November 1997, 416 Haitians on an 80-foot wooden-hulled freighter were intercepted approximately six nautical miles southeast of Miami Beach.⁵² The vessel refused to stop until shouldered by the Coast Guard Cutter *Maui*, a 110-foot patrol boat, which prevented the migrants from entering the United States. This was the largest single group of migrants interdicted since November 1995. All were repatriated to Port au

Prince, except for a pregnant, nineteen-year-old female suffering from dehydration and possible pneumonia, who was brought to Miami for medical treatment.

Despite the fact that there has been no formal agreement in place since 1994, when the 1981 Agreement was terminated by President Aristide according to its terms, Haiti continues to permit repatriation of all Haitian migrants interdicted by the Coast Guard at sea. Since the original interdiction agreement was entered into by the totalitarian Duvalier regime and abrogated by the democratic government of Aristide, any new standing interdiction agreement appears unlikely in the near future. United Nations peacekeeping forces assisted in recent elections in Haiti, but the results were tainted by fraud, essentially leaving Haiti without an effective government since the resignation of Premier Rosny Smarth in June of 1997.⁵³ With the departure of United Nations peacekeeping forces on 1 December 1997, a refusal by the Haitian government to accept the return of migrants for any reason could precipitate another mass exodus and have far-reaching consequences for both the United States and the Coast Guard.

Cuban Migrant Interdiction Operations

When Fidel Castro opened the port of Camarioca in 1965, over 6,000 Cubans fled to the United States.⁵⁴ After one of the vessels capsized, President Lyndon Johnson commenced eight years of "Freedom Flights," in which over a quarter million Cubans immigrated to the United States.

In 1980, the Mariel Boatlift brought more than 100,000 Cubans to U.S. shores. These Cuban migrants enjoyed a special status that the Haitian migrants did not. Unlike the Haitians, the Cuban Refugee Adjustment Act⁵⁵ permitted the Attorney General to grant permanent resident status to Cuban citizens present in the United States for at least one year. President Carter permitted the "Marielitos" to enter the United States, and Castro took full political advantage of this opportunity to rid Cuba of many criminals, mentally ill persons, and others that he considered to be undesirable elements.

In the years after the Mariel Boatlift, migrant attempts to evade Cuban authorities and reach the United States persisted on a small scale, but one which progressively increased in magnitude. Then, on 8 August 1994, Fidel Castro announced that the Cuban government would no longer forcibly prevent Cuban citizens from emigrating by boat. This policy precipitated a flood of "balseros" aboard homemade rafts and boats attempting to negotiate ninety treacherous miles across the Gulf Stream to the United States. In two

weeks, more than 2,700 Cubans were rescued by the units of Operation Able Vigil, with the rate of rescue at times reaching nearly 750 per day.⁵⁶ Many were lost at sea.

In a press conference on 19 August 1994, President Clinton stated:

In recent weeks the Castro regime has encouraged Cubans to take to the sea in unsafe vessels to escape their nation's internal problems. In so doing, it has risked the lives of thousands of Cubans, and several have already died in their efforts to leave. This action is a cold-blooded attempt to maintain the Castro grip on Cuba, and to divert attention from his failed communist policies. He has tried to export to the United States the political and economic crisis he has created in Cuba, in defiance of the democratic tide flowing throughout this region. Let me be clear: The Cuban government will not succeed in any attempt to dictate American immigration policy. The United States will do everything within its power to ensure that Cuban lives are saved and that the current outflow of refugees is stopped.⁵⁷

In order to stem the tide of Cuban migrants and prevent further loss of life, the policy that provided for permanent resident status was terminated. President Clinton also ordered the Coast Guard to interdict Cubans at sea and transport them to Guantanamo Bay, where they received treatment similar to Haitian migrants interdicted at sea. From there, the United States engaged in a program of voluntary repatriations while negotiating with other countries to accept migrants into safe havens. By the end of fiscal year 1994, a total of 38,560 Cuban migrants were interdicted.⁵⁸ This exceeded the total number of Haitians interdicted during the mass exodus of fiscal year 1992.

Further negotiations with the Cuban government resulted in a joint communiqué between the United States and Cuba on 2 May 1995.⁵⁹ In this communiqué, the United States agreed to allow Cuban migrants to enter the United States only by applying for a visa or refugee status at the United States Interests Section in Havana. It further permits 20,000 Cubans per year to enter the United States legally. This agreement has facilitated the direct repatriation of approximately 75 percent of all Cubans intercepted at sea,⁶⁰ with the remainder going to Guantanamo or to the United States at the direction of the INS.⁶¹ It also reaffirmed a commitment to in-country processing of refugee claims through the United States Interests Section in Havana. This policy has achieved its purpose of deterring dangerous migration from Cuba by boat by offering a safe alternative.⁶² Since the 2 May 1995 accord, illegal migration from Cuba has been significantly reduced and remains relatively stable at about thirty to fifty migrants per month.⁶³

A legal challenge was asserted to determine whether Cuban migrants temporarily given safe haven at the United States Naval Base at Guantanamo Bay could assert rights under the INA and Article 33 of the United Nations Convention Relating to the Status of Refugees. The Eleventh Circuit Court of Appeals⁶⁴ rejected the argument that leased military bases in foreign countries (such as Guantanamo Bay) are ports of entry or otherwise “within the United States” for purposes of the INA. It also held that granting safe haven did not create a protected liberty interest, the deprivation of which would require the government to provide due process of law.⁶⁵

Dominican Migrant Interdiction Operations

A relatively new development in Coast Guard alien migrant interdiction operations is the emergence of the Dominican Republic as a major source of undocumented aliens. Puerto Rico lies sixty miles beyond the east coast of the Dominican Republic. Migrants navigate the Mona Passage in small, open, wooden boats known as “yolas,” powered by outboard motors. They are often camouflaged, covered with tarps, and drift during daylight hours to avoid detection. Many of these attempts to enter the United States illegally through Puerto Rico are organized alien smuggling ventures. Organizers can receive more than \$40,000 for a single run.⁶⁶

With the decline in Haitian and Cuban migrants after 1994, the Coast Guard was able to dedicate more resources to patrolling the Mona Passage. Between 1994 and 1995, the number of undocumented aliens interdicted by the Coast Guard in the Mona Passage increased by more than 800 percent, from 371 to 3,375.⁶⁷ Since that time, the Coast Guard has been patrolling the Mona Pass with a nearly constant presence of several cutters and aircraft. These efforts resulted in the interdiction of 6,273 Dominicans in fiscal year 1996. When a yola is intercepted, the migrants are typically repatriated to the Dominican Republic, either by rendezvous and transfer to the Dominican Navy or by direct dockside repatriation in the Dominican Republic.

A recent case illustrates the role of the Coast Guard in the Mona Passage. On 5 February 1997, the Coast Guard cutter *Courageous* was participating in Operation Frontier Shield⁶⁸ in the Mona Passage. They spotted an overloaded, 50-foot yola approximately 35 miles west of Puerto Rico. The cutter immediately launched both of its small boats. While they were handing out lifejackets to the migrants in preparation for their transfer to the cutter, the yola capsized, and 108 persons ended up in the water. One drowned, and three

were reported missing. The others were transferred to the INS in San Juan, Puerto Rico, three days later.

The four Dominicans who coordinated the smuggling venture were indicted on 12 February 1997 for attempting to bring aliens into the United States illegally. The indictment charged them with violations of 8 USC §1324(a)(1)(A)(i), §1324(a)(1)(B)(iv), and 18 USC §2.⁶⁹ They were held without bail, and if convicted, the four defendants could possibly receive the death penalty. As of this writing, the case is pending trial in the United States District Court for the District of Puerto Rico.

Chinese Migrant Interdiction Operations

Sometime after midnight on 6 June 1993, the M/V *Golden Venture* ran aground on a sandbar approximately 100 yards off Long Island. State and federal law enforcement agencies, including the Coast Guard, began arriving *en masse* soon thereafter. Some of the 286 Chinese migrants on board were observed running on the beach, with others attempting to swim ashore in the 53°F water. About 100 remained on the ship awaiting rescue. About 30 made it into the surrounding community. The others were detained in the custody of the INS. Exclusion proceedings were brought against the detainees, many of whom applied for political asylum. The legal issue raised by those proceedings was whether the Chinese were entitled to a deportation hearing by virtue of having “entered” the United States. In resolving the claims of those on board the M/V *Golden Venture*, the Court of Appeals in *Yang v. Maugans*⁷⁰ held that despite the fact that some migrants were walking ashore though the surf when apprehended, a person does not make an “entry” into the United States for purposes of INA deportation hearing entitlements until they are physically present on “dry land.”

Another case illustrates the problems involved in repatriating Chinese migrants interdicted on the high seas. Based on information obtained by an undercover agent for the INS during a complex sting operation, the Coast Guard cutter *Reliance* intercepted the M/V *Xing Da* on 2 October 1996. The vessel was approximately 130 miles northeast of Bermuda, and, in addition to 26 crew members, had 83 illegal Chinese migrants in the ship’s cargo hold. The migrants had been in the cargo hold of the rusty, 220-foot freighter since it left China’s Guang Zhou province more than three months previously on a voyage to a planned rendezvous in the Atlantic Ocean via Africa’s Cape of Good Hope. A fishing vessel was then to embark the migrants and land them somewhere near Boston.⁷¹

When the M/V *Xing Da* was first hailed on the radio by the Coast Guard, a person purporting to be the master consented to a Coast Guard boarding. The vessel flew no flag but had markings on the hull indicating the home port of the vessel was in the People's Republic of China (PRC). The "master" also claimed to be a PRC citizen. Documents were found on board which, while inconclusive, gave indications that the vessel might be validly registered in the PRC. Therefore, the Coast Guard requested through diplomatic channels that the PRC government confirm the registry of the vessel and grant permission for United States authorities to take any action necessary to insure the safety of those onboard.

Some of the migrants were severely dehydrated and water had to be brought to the vessel. The decks were littered with debris and garbage. The vessel was also plagued with mechanical problems, had no electricity, and its bilge was filled with fuel that had leaked from the tanks. Soon after the Coast Guard boarding team came aboard, the migrants began setting fires and banging on the hull in an apparent attempt to sink the vessel. It was believed that the trouble was incited by enforcers called "snakeheads," who hoped to force the Coast Guard to bring them ashore in the United States.⁷² These migrants frequently pay up to \$30,000 for their transportation and, in return, must liquidate their debt by working for the organizers at rates often below minimum wage for as long as 10 years.⁷³

The PRC government had some information about a vessel with the same name, but claimed they needed additional time to confirm the vessel's nationality as PRC. They did, however, give their consent for the United States to take whatever action was deemed necessary to ensure the safety of those on board in the interim. The government of Bermuda reluctantly permitted the Coast Guard to anchor the vessel temporarily as long as the migrants were removed from Bermuda as soon as possible. Consistent with the consent granted by the PRC to ensure the safety of those on board, they were transported to Guantanamo Bay for processing and eventually returned to the PRC by way of Wake Island.⁷⁴

It soon became apparent that the PRC government did not intend to unequivocally confirm the vessel's registry. The United States then informed them that unless they objected within a certain time, the vessel would be declared stateless and seized under United States law.⁷⁵ Approximately two weeks after the initial interdiction, the vessel was assimilated to a stateless vessel and became subject to the full jurisdiction of the United States.

Because of the distances involved, interdiction of Chinese migrant vessels are often resource intensive and come at a very high cost. The M/V *Jung Sheng*

#8 was first sighted on 27 June 1995, nearly 1,000 miles southeast of Hawaii. The interdiction operation involved three Coast Guard cutters, a C-130 aircraft, an H-65 helicopter, and numerous land-based support personnel. The operation took forty-five days and covered 6,000 miles. The 147 migrants were transported to Wake Island, where a Joint Task Force had to be established to facilitate the return of the migrants to the PRC. It is estimated that the total cost of the interdiction of these 147 migrants exceeded \$11 million.⁷⁶

On 12 August 1997, the 150-foot merchant vessel, *Lapas No. 3*, was intercepted 200 miles south of San Diego with sixty-nine illegal Chinese migrants on board. The vessel had weathered three typhoons and was nearly out of food and fuel. Coast Guard units stayed on scene for more than two weeks providing food, water, and medical assistance. The Mexican government eventually agreed to tow the vessel to Mexico, where the migrants were then repatriated to China.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996

On 30 September 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁷⁷ The entire system for deportation and exclusion of aliens was substantially modified. The concept of “entry” was replaced by “admission,” which means the lawful entry of an alien into the United States after inspection by an immigration officer. IIRIRA §304 replaced both deportation and exclusion hearings with a single streamlined “removal proceeding.”⁷⁸

Section 302 establishes a summary screening program which permits an INS officer to determine an alien inadmissible and order him or her removed from the United States without further hearing or judicial review. If such an alien indicates an intention to apply for asylum, the case must be referred to an asylum officer to conduct a “credible fear of persecution” screening to determine whether there is a significant possibility that the alien could establish eligibility for asylum.

Under §302 an alien “present in the United States” is entitled to a removal proceeding which results in either admission, asylum, or removal.⁷⁹ But, determining whether an alien is “present in the United States” by using the “dry land” standard adopted by the court in *Yang* may not provide clear guidance to the Coast Guard in determining when an alien may be repatriated and when they have acquired a right to a removal proceeding. For example,

aliens on board a moored vessel, who disembark onto a pier, or who come ashore and then later return to their vessel, may not be on “dry land.”

Certain provisions of the IIRIRA have the potential for significant impact on Coast Guard alien migrant interdiction operations. For example, 8 USC §1231(c) and (d) make the owner or commanding officer of a vessel or aircraft bringing an alien into the United States personally responsible for transporting an alien to the foreign country to which they are ordered removed. It also makes the owner or commanding officer financially responsible for the costs of both detaining and repatriating the alien. The statute does not explicitly provide for an exception to this requirement for public vessels. This mandate could place a large potential burden on the limited financial and operational resources of the Coast Guard. It could also discourage good Samaritans from complying with their legal obligations under both 46 USC §2304 and customary international law to render assistance to those in peril on the sea. Requiring a good Samaritan to bear the financial burden of detention and repatriation would unfairly penalize him or her for undertaking a rescue of anyone whose immigration status is uncertain. A direct result of this disincentive could be a greater demand on Coast Guard resources for search and rescue operations.

“Expedited removal” is another provision of IIRIRA, which could have the potential for significant impact on Coast Guard alien migrant interdiction operations. It was created by §302,⁸⁰ which amends 8 USC §1225 to provide for a streamlined removal procedure of “applicants for admission” who are deemed inadmissible by an immigration officer. This procedure took effect on 1 April 1997. Applicants for admission include aliens brought into the United States after having been interdicted at sea.⁸¹ An applicant may be deemed inadmissible for attempting to enter the United States through misrepresentation, fraud, or without valid travel and/or visa documents. Such applicants for admission may be removed without further hearing, appeal, or judicial review unless they affirmatively indicate either an intention to apply for asylum, or a fear of persecution if returned.⁸² Once ordered removed, removal must take place within ninety days.

The IIRIRA also includes mass migration provisions in §372 which provide:

In the event the Attorney General determines that an actual or imminent influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate federal response, the Attorney General may authorize any State or local law enforcement officer . . . to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued hereunder upon officers or employees of the Service.⁸³

Section 372 could help avoid backlogs in the removal process during mass migrations, such as those from Haiti and Cuba, by ensuring that sufficient resources are made available for making admissibility determinations when necessary.

From the Coast Guard's perspective, expedited removal could help reduce the resource burden during alien interdictions by obviating the need for cutters to be used as holding platforms. Once saturated with migrants, a cutter ceases to become an effective operational unit, and must focus all its efforts internally on the care, feeding, and security of the migrants. Using the expedited removal provisions, cutters could bring or transfer aliens into the United States for further return to their country of origin by another agency without implicating comprehensive and burdensome hearing entitlements. This would enable the cutters to perform their primary mission in their area of responsibility for longer periods of time, rather than merely acting as an inadequate holding facility with migrants on board for extended periods awaiting disposition and transportation.

Whether or not these new procedures are expeditious in practice remains to be seen. If an interview is required to determine whether an applicant for admission has a credible fear of persecution, the applicant may request review by an immigration judge. This review must occur within seven days. While the immigration judge's decision is intended to be final, such administrative decisions have generally been held to be subject to judicial review. Litigation may be required to resolve this issue and could delay or prevent full implementation of the expedited removal procedures. In addition, another mass migration by sea could create a backlog of applicants burdening the system. This might make it impossible to meet the established timelines in the regulations and create political pressure from adversely affected communities. Except where the time and distance involved in direct repatriation is extraordinary, transportation of migrants interdicted at sea back to the United States for expedited removal by forward deployed Coast Guard cutters may be more resource intensive, logistically burdensome, and result in no net tactical advantage. As a result, expedited removal appears best suited for those migrants who manage to elude at-sea interdiction but for some reason arrive at a port of entry. It does not appear likely to replace the need for continuing Coast Guard operations to interdict and repatriate illegal alien migrants at sea.

Notes

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Guard. The views expressed herein are those of the author and do not necessarily express those of the United States Coast Guard.

1. 63 Stat. 495 (1949).
2. Despite the broad nature of the authority conferred by this statute, courts have consistently upheld its constitutionality. *See, e.g.*: *United States v. Freeman*, 660 F. 2d 1030 (5th Cir.), *cert. denied* 459 U.S. 823 (1981); *United States v. One (1) 43 Foot Sailing Vessel "Winds Will,"* License O.N. 531317/US, 538 F. 2d 694 (5th Cir. 1976); *United States v. Erwin*, 602 F. 2d 1183 (5th Cir.), *rehearing denied* 602 F. 2d 992, *cert. denied* 444 U.S. 1071, *rehearing denied* 445 U.S. 972 (1979).
3. *See* "An Act to Define the Jurisdiction of the Coast Guard," Pub. L. No. 74-755, 49 Stat. 1820 (1936).
4. 274 U.S. 501 (1927).
5. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 2 L. Ed. 208 (1804).
6. 13 U.S.T. 2312, T.I.A.S. 5200 (entered into force September 30, 1962).
7. U.N. Doc. A/CONF. 62/122 (1982) [hereinafter LOS Convention].
8. Presidential Proclamation No. 5030 of March 10, 1983, 48 Fed. Reg. 10605 (1983). The United States did not sign the 1982 LOS Convention because of its view that there were major problems in the deep seabed mining provisions that were contrary to the interests and principles of industrialized nations.
9. Geneva Convention on the High Seas, Apr. 29, 1958, art. 22; [hereinafter High Seas Convention]; 1982 LOS Convention *supra* note 7, art. 110.
10. Other exceptions to exclusive flag state jurisdiction on the high seas include hot pursuit and the related concept of constructive presence (High Seas Convention, art. 23; 1982 LOS CONVENTION, art. 111), as well as additional exceptions during armed conflict regarding rights and duties of neutrals and belligerents. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS §522 (1987).
11. While the master of a vessel may consent to a boarding and other actions once on board (such as the search of various compartments), the master does not have the authority to waive the exclusive jurisdiction of the flag state or to consent to the exercise of complete criminal jurisdiction by the United States.
12. S. TREATY DOC. NO. 103-39 (1994). On July 29, 1994, the United States signed the Agreement Relating to the Implementation of Part IX of the United Nations Convention on the Law of the Sea. This agreement fundamentally changed the deep seabed mining provisions of the LOS Convention, and removed or amended the provisions to which the United States was most opposed. *See also* Marian Nash (Leich), *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 112 (1995).
13. *See also* *United States v. Hensel*, 699 F. 2d 18 (1st Cir.), *cert. denied* 464 U.S. 824 (1983); *United States v. Marsh*, 747 F. 2d 7, 9 (1st Cir. 1984); *United States v. Crews*, 605 F. Supp. 730, 736 (S.D. Fla. 1985), *aff'd* *United States v. McGill*, 800 F. 2d 264 (11th Cir. 1986).
14. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).
15. Pub. L. No. 104-208, 110 Stat. 3009 (1996).
16. 8 U.S.C. §§1101-1525 (1994).
17. 8 U.S.C. §1252 (1994).
18. 8 U.S.C. §§1225, 1226 (1994).
19. 8 U.S.C. §1101(a)(13) (1994). Nothing in the statutory scheme accords any procedural rights to aliens before reaching a port. Therefore, for purposes of the INA the ports of the United States function as the border, rather than the limits of the territorial sea.

20. Haitian Refugee Center v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir 1987).
21. 8 U.S.C. §§1157, 1158 (1994).
22. 8. U.S.C. § 1253(h)(1) as amended by §203(e) of the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 107.
23. 17 S. REP. NO. 256, 96th Cong., 1st Sess. (1979)
24. Jul. 28, 1951, 19 U.S.T. 6259.
25. Jan. 31, 1967, 19 U.S.T. 6223.
26. Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).
27. This exodus only temporarily subsided with the overthrow of Duvalier in the mid-1980s, and the eventual popular democratic election of President Jean-Bertrand Aristide.
28. 46 Fed. Reg. 48109 (1981).
29. See also Presidential Proclamation No. 4865, 3 C.F.R. §50, 51 (1981–1983 Comp.).
30. Haitian Refugee Center v. Gracey, *supra*, note 20.
31. *Supra*, note 28.
32. *Id.*
33. 33 U.S.T. 3559, T.I.A.S. No. 10241. The 1981 Agreement with Haiti was terminated by President Aristide in 1994 according to its terms.
34. “Entry” was defined as “any coming of an alien onto the United States from a foreign port or place or from an outlying possession, whether voluntarily or otherwise. . . .” 8 U.S.C. §1101(a)(13) (1994).
35. *Id.*
36. 8 U.S.C. §1253(h) (1988).
37. For a more complete discussion of the specific entitlements under both exclusion and deportation proceedings, see Landon v. Plasencia, 459 U.S. 21, 26–27 (1982).
38. The following descriptions of Haitian migrant vessels and conditions on board are based on the author’s firsthand observations while conducting extensive alien migrant interdiction operations off the coasts of Haiti and Cuba as Executive Officer, USCGC *Vigorous* (WMEC 626) from 1985–1987, and as Commanding Officer, USCGC *Dependable* (WMEC 626), from 1990–1992.
39. A refugee as defined in 8 U.S.C. §1101(a)(42)(A) includes a person unwilling or unable to return to a country because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.
40. The cutters interdicting these aliens ranged in size from 110 feet to 378 feet in length. They did not have either the facilities, training, or cargo capacity to provide food, shelter, security, sanitation facilities, and otherwise meet the basic human needs of hundreds of people for indefinite periods.
41. On January 13-14, 1991, the author interdicted three migrant vessels with a total of 240 Haitians. While on board USCGC *Dependable* (WMEC 626) awaiting repatriation, the migrants went on a brief hunger strike and engaged in several organized protests which included loud, rhythmic chanting. Fighting broke out among several factions of migrants. One migrant with a knife had to be disarmed by security personnel. Several migrants had to be physically restrained with leg irons for assaulting other migrants and security personnel. These observations were recorded in the author’s personal journal.
42. Similar to Mace, CURB 60 came in a small, hand-held spray applicator and had an effective range of about twenty feet. It is no longer used by the Coast Guard. Reports of these disturbances were noted in the After Action Reports of other cutters, which the author reviewed

as part of his official duties as Commanding Officer, USCGC *Dependable* (WMEC 626), from June 1990 through January 1992.

43. 57 Fed. Reg. 12133 (1992).

44. Sale, *supra*, note 26. In upholding the legality of the Order, the Court held that neither §243(h) of the INA nor Article 33 of the United Nations Convention Relating to the Status of Refugees limited the President's power to order the Coast Guard to repatriate undocumented aliens intercepted on the high seas.

45. The French word "refouler" is not an exact synonym for the English word "return," but has been interpreted to mean, among other things, "expel." See Sale, *id.* at 24–25.

46. 19 U.S.T. 6259, T.I.A.S. No. 6577 (1992).

47. Exec. Order No. 12,807, §2(c)(3) (emphasis added).

48. Haitian Refugee Center, Inc. v. Gracey, *supra*, note 20.

49. Haitian Refugee Center, Inc. v. Baker, 949 F. 2d 1109 (11th Cir. 1991), *cert. denied* 502 U.S. 1122 (1992).

50. Sale, *supra* note 26.

51. See also Haitian Refugee Center, Inc. v. Christopher, 43 F. 3d 1431, 1433 (11th Cir. 1995).

52. <http://www.dot.gov/dotinfo/uscg/cgnews.html>>, November 30, 1997.

53. Michelle Faul, *U.N. Peacekeepers Ending Their Three-Year Mission in Haiti Today with Mixed Results*, THE NEW LONDON DAY, Nov. 30, 1997.

54. Michael Lind, *Cuban Refugees at Sea: A Legal Twilight Zone* 24 CAP. U. L. REV. 789, 793 (1995).

55. Pub. L. No. 89-732, 80 Stat. 1161 (1966).

56. Lind, *supra*, note 54, at 809.

57. Lind, *supra*, note 54, at n.155.

58. Data obtained from Commandant, U. S. Coast Guard, Office of Law Enforcement, Migrant Interdiction Division, Washington, D.C.

59. DoS: 95-126 (May 2, 1995).

60. Data obtained from Commandant, U. S. Coast Guard, Office of Law Enforcement, Migrant Interdiction Division, Washington, D.C.

61. INS agents generally interview the migrants on the cutter to determine whether they might be eligible for asylum. Those that meet the threshold requirements are taken to Guantanamo Bay to gather additional evidence. Some of these migrants may eventually enter the United States, willingly return to Cuba, or be granted safe haven in a third country.

62. See, *supra*, note 51, at 1418, n. 2.

63. Data obtained from Commandant, U. S. Coast Guard, Office of Law Enforcement, Migrant Interdiction Division, Washington, D.C.

64. Haitian Refugee Center, Inc. v. Christopher, *supra* note 51, at 1425.

65. *Id.* at 1432.

66. Another indication of the magnitude of these organized alien smuggling ventures is that the Dominican Republic is now the largest importer of outboard engines in Latin America. See *Changing Tactics in the Mona Pass*, COMMANDANTS BULLETIN, COMDT PUB P5720.2, Issue #2 (Feb. 1996), at 4.

67. *Id.* at 5.

68. Operation Frontier Shield is a large-scale, multiagency counternarcotics operation in the Greater and Lesser Antilles, which commenced on October 1, 1996. In the first 30 days of the operation, Coast Guard assets seized more than 4,500 pounds of cocaine and interdicted 124 illegal migrants. The large number of assets dedicated to this operation have reduced migrant

activity in the Mona Passage to its lowest level in nearly 3 years. See *Frontier Shield*, COAST GUARD, COMDT PUB P5720.2, Issue #1 (Jan. 1997), at 2-7.

69. These provisions prohibit any attempt to knowingly land an alien at other than a designated port of entry without prior official authorization. Capital punishment is authorized for such an attempt which results in the death of any person.

70. 68 F. 3d 1540 (3rd Cir. 1995).

71. Patricia Nealon, *US Says it Halted Smugglers Bringing Chinese to Mass.*, BOSTON GLOBE, Oct. 9, 1996.

72. Jules Critten, *Slave Ship*, BOSTON HERALD, Oct. 9, 1996. Illegal Chinese migration is often linked to extremely violent criminal organizations in PRC and Taiwan.

73. *Id.*

74. The INA does not apply in Wake Island. Also, the PRC has generally been unwilling to agree to repatriation of PRC migrants from third party countries.

75. Bermuda had expressed interest in sinking the vessel as an artificial reef. Seizing the vessel under United States law helped to facilitate the transfer of title to Bermuda and finance the cleanup of the vessel.

76. Data obtained from Commandant, U. S. Coast Guard, Office of Law Enforcement, Migrant Interdiction Division, Washington, D.C.

77. Pub. L. 104-208, 110 Stat. 3009 (1996).

78. 8 U.S.C. §1229a (1996).

79. 8 U.S.C. §1225 (1996).

80. Pub. L. No. 104-208

81. Cuban citizens arriving by aircraft at a port of entry are exempt from expedited removal. 8 U.S.C. §1225(b)(1)(F) (1996). This exemption also technically applies to other countries in the Western Hemisphere with which the United States does not have normal diplomatic relations.

82. This limitation on judicial review may be subject to challenge on due process grounds.

83. 8 U.S.C. §1103(a)(8)(1996).

IX

The Maritime Claims Reference Manual and the Law of Baselines

J. Ashley Roach

Origin of the Maritime Claims Reference Manual

ON 4 MAY 1982, Captain Jack Grunawalt was called to the cabin of Admiral Bob Long, Commander in Chief, U.S. Pacific Command, Camp Smith, Hawaii,¹ and asked why the Soviets would be ordering USS *Lockwood* (FF-1064) to leave waters of the Soviet Union when the ship was operating on the high seas more than 12 miles from land and outside Peter the Great Bay.² Jack, who had been off-island when the operation was approved, knew that in 1957 the USSR had claimed Peter the Great Bay as historic internal waters of the Soviet Union, defining the bay closing line as the line connecting the estuary of the Tyumen-Ula River and the Povrotny promontory.³ However, in examining the chart illustrating *Lockwood*'s approved operating area, Jack observed that the closing line had been drawn to a point further inside the bay than claimed by the Soviets. He noted that the location of the baseline was not indicated on U.S. nautical charts of the area or otherwise illustrated in publications available to an assistant who had cleared

on the plan. Further, he observed the command had no ready authoritative source listing the coordinates of the claimed bay closing line against which to verify the location of the closing line. The United States rejected the Soviet protest of this incident, as it did not recognize the Soviet historic bay claim and the mouth of the bay far exceeded the maximum permissible length of a bay closing line.⁴

Thereafter, at Jack's urging, Admiral Long sent an urgent message to the Joint Chiefs of Staff (JCS) recommending the Department of Defense (DoD) develop a manual containing a complete description of the maritime claims made by all nations, particularly a list of the coordinates of all claimed baselines and closing lines, that would be available to all the operating forces. The JCS and the Office of the Secretary of Defense agreed with that recommendation and thus began work on what has become the DoD *Maritime Claims Reference Manual*,⁵ now in its third edition. The MCRM, as it is known world-wide, contains summaries, or in the case of baselines, full texts, of all the maritime claims made by the nations of the world. In addition, it also indicates the United States' diplomatic and operational reactions to those claims which are inconsistent with the law of the sea—hence the term “excessive maritime claims.”

Jack's other contributions to the law of the sea are too numerous to catalog here. But as baselines are the foundation for the measurement of all maritime zones, it seems appropriate that this tribute present the official views of the United States on the law of baselines, as based on the Commentary on the Law of the Sea (LOS) Convention attached to the Secretary of State's letter of 23 September 1994, submitting the Convention and the Part XI Agreement to the President for transmittal to the Senate for its advice and consent.⁶ Because of the desirability—né necessity—of achieving a uniform interpretation of those rules, annotations have been added by the author to provide the rationale for those views.⁷

Background

A State's maritime zones are measured from the baseline. The rules for drawing baselines are contained in Articles 5 through 11, 13, and 14 of the LOS Convention.⁸ These rules distinguish between *normal* baselines (following the low-water mark along the coast) and *straight* baselines (which can be employed only in specified geographical situations).⁹ The baseline rules take into account most of the wide variety of geographical conditions existing along the coastlines of the world. Baseline claims can extend maritime jurisdiction significantly seaward in a manner that prejudices navigation, overflight, and

other interests.¹⁰ Objective application of the baseline rules contained in the Convention can help prevent excessive claims in the future and encourage governments to revise existing claims to conform to the relevant criteria.¹¹

Normal Baseline

The normal baseline used for measuring the breadth of the territorial sea is the low-water line along the coast as marked on the State's official large-scale charts.¹² "Low-water line" has been defined as "the intersection of the plane of low water with the shore. The line along a coast, or beach, to which the sea recedes at low-water." The actual water level taken as low-water for charting purposes is known as the level of Chart Datum.¹³

Normal baseline claims must be consistent with this rule. Excessive normal baseline claims include a claim that low-tide elevations, wherever situated, generate a territorial sea and that artificial islands generate a territorial sea (e.g., by Egypt and Saudi Arabia).¹⁴

Reefs. In the case of islands situated on atolls or of islands having fringing reefs, the normal baseline is the seaward low-water line of the drying reef charted as being above the level of chart datum.¹⁵ While the LOS Convention does not address reef closing lines, any such line must not adversely affect rights of passage, freedom of navigation, and other rights provided for in the Convention.

Straight Baselines

Purpose. The purpose of authorizing the use of straight baselines is to allow the coastal State, at its discretion, to enclose those waters which, as a result of their close interrelationship with the land, have the character of internal waters. By using straight baselines, a State may also eliminate complex patterns, including enclaves, in its territorial sea, that would otherwise result from the use of normal baselines.¹⁶ Properly drawn straight baselines do not result in extending the limits of the territorial sea significantly seaward from those that would result from the use of normal baselines.¹⁷

With the advent of the exclusive economic zone (EEZ), the original reason for straight baselines (protection of coastal fishing interests) has all but disappeared. Their use in a manner that prejudices international navigation, overflight, and communications interests runs counter to the thrust of the Convention's strong protection of these interests. In light of the modernization

of the law of the sea in the Convention, it is reasonable to conclude that, as the Convention states, straight baselines are not normal baselines, should be used sparingly, and, where used, should be drawn conservatively to reflect the one rationale for their use that is consistent with the Convention, namely the simplification and rationalization of the measurement of the territorial sea and other maritime zones off highly irregular coasts.¹⁸

Areas of Application. Consequently, international law permits States—in limited geographical circumstances—to measure the territorial sea and other national maritime zones from straight baselines drawn between defined points of the coast. The United States accepts that the two specific geographical circumstances under which States may employ straight baselines are as described in Article 7, paragraph 1, of the LOS Convention and Article 4, paragraph 1, of the 1958 Territorial Sea Convention:

In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

If the portion of the coast being examined does not meet either criterion, then no straight baseline segment may lawfully be drawn in that locality, and the other rules (on permissible basepoints, the vector of the putative straight baseline in relation to the coast, and the requisite quality of the waters that would be enclosed) may not be invoked.¹⁹ Further, the coastal State must fulfill all the requirements of one test or the other, and may not mix the requirements. For example, a State may not claim that a locality is indented, though not deeply, and that it has some islands, though they do not constitute a fringe, and claim it may draw straight baselines in that locality. Either test selected must be met entirely on its own terms. If a coastal State cannot establish that its coastline in the locality in which the straight baseline is sought is deeply indented and cut into or fringed with islands in the immediate vicinity, it may not proceed to identify appropriate straight baselines, for none are authorized to be drawn there. Rather, it must use as a baseline in that locality its low-water mark. Failure to meet this preliminary geographical test in one locality does not preclude establishing it in another.²⁰ Even if the basic geographic criteria exist in any particular locality, the coastal State is not obliged to employ the method of straight baselines, but may (like the United States and other countries) instead continue to use the normal baseline and permissible closing lines across the mouths of rivers and bays.

Localities Where the Coastline is Deeply Indented and Cut Into. “Deeply indented and cut into” refers to a very distinctive coastal configuration. The United States has taken the position that such a configuration must fulfill all of the following characteristics:²¹

- 1) in a locality where the coastline is deeply indented and cut into, there exist at least three deep indentations;²²
- 2) the deep indentations are in close proximity to one another;²³ and
- 3) the depth of penetration of each deep indentation from the proposed straight baseline enclosing the indentation at its entrance to the sea is, as a rule, greater than half the length of that baseline segment.²⁴

The “coastline” is the mean low-water line along the coast; the term “localities” refers to particular segments of the coastline.²⁵

Fringe of Islands Along the Coast in its Immediate Vicinity. “Fringe of islands along the coast in its immediate vicinity” refers to a number of islands and not to other features that do not meet the definition of an island contained in Article 121(1) of the LOS Convention.²⁶ The United States has taken the position that a such a fringe of islands must meet all of the following requirements:²⁷

- 1) the most landward point of each island lies no more than 24 miles from the mainland coastline;²⁸
- 2) each island to which a straight baseline is to be drawn is not more than 24 miles apart from the island from which the straight baseline is drawn;²⁹ and
- 3) the islands, as a whole, mask at least 50 percent of the mainland coastline in any given locality.³⁰

Criteria for Drawing Straight Baseline Segments. The United States has taken the position that, to be consistent with Article 7(3) of the LOS Convention, straight baseline segments must:

- 1) not depart to any appreciable extent from the general direction of the coastline, by reference to general direction lines which in each locality shall not exceed 60 miles in length;³¹

2) not exceed 24 miles in length;³² and

3) result in sea areas situated landward of the straight baseline segments that are sufficiently closely linked to the land domain to be subject to the regime of internal waters.³³

Minor Deviations. Straight baselines drawn with minor deviations from the foregoing criteria are not necessarily inconsistent with the Convention.³⁴

Economic Interests. Economic interests alone cannot justify the location of particular straight baselines.³⁵ In determining the alignment of particular straight baseline segments of a baseline system which satisfies the deeply indented or fringing islands criteria, only those economic interests may be taken into account which are peculiar to the region concerned, and only when the reality and importance of the economic interests are clearly evidenced by long usage.³⁶

Basepoints. Except as noted in Article 7(4) of the LOS Convention, basepoints for all straight baselines must be located on land territory and situated on or landward of the low-water line. No straight baseline segment may be drawn to a basepoint located on the land territory of another State.³⁷

Use of Low-Tide Elevations as Basepoints in a System of Straight Baselines. A low-tide elevation is a naturally formed land area surrounded by water and which remains above water at low tide but is submerged at high tide.³⁸ Low-tide elevations can be mud flats or sand bars. In accordance with Article 7(4), only those low-tide elevations which have had lighthouses or similar installations built on them may be used as basepoints for establishing straight baselines.³⁹ Other low-tide elevations may not be used as basepoints unless the drawing of baselines to and from them has received general international recognition.⁴⁰ The United States has taken the position that "similar installations" are those that are permanent, substantial, and actually used for safety of navigation and that "general international recognition" includes recognition by the major maritime users over a period of time.⁴¹

Effect on Other States. Article 7(6) of the LOS Convention provides that a State may not apply the system of straight baselines in such a manner as to cut off the territorial sea of another State from the high seas or an EEZ.⁴² In addition, Article 8(2) of the LOS Convention provides that, where the establishment of a straight baseline has the effect of enclosing as internal

waters areas which had not previously been considered as such, a right of innocent passage as provided in the Convention shall exist in those waters.⁴³ Article 35(a) of the LOS Convention has the same effect with respect to the right of transit passage through straits.

Unstable Coastlines. Where the coastline, which is deeply indented and cut into or fringed with islands in its immediate vicinity, is also highly unstable because of the presence of a delta or other natural conditions, the appropriate basepoints may be located along the furthest seaward extent of the low-water line. The straight baseline segments drawn joining these basepoints remain effective, notwithstanding subsequent regression of the low-water line, until the baseline segments are changed by the coastal State in accordance with the international law reflected in the LOS Convention.⁴⁴

Other Baseline Rules

Low-Tide Elevations. The low-water line on a low-tide elevation may be used as the baseline for measuring the breadth of the territorial sea only where that elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea measured from the mainland or an island. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, even if it is within that distance measured from a straight baseline or bay closing line, it has no territorial sea of its own.⁴⁵

Combination of Methods. A coastal State may determine each baseline segment using any of the methods permitted by the LOS Convention that suit the specific geographic condition of that segment, i.e., the methods for drawing normal baselines, straight baselines, or closing lines.⁴⁶

Harbor Works. Only those permanent man-made harbor works which form an integral part of a harbor system, such as jetties, moles, quays, wharves, breakwaters, and sea walls, may be used as part of the baseline for delimiting the territorial sea.⁴⁷ Offshore installations and artificial islands are not considered permanent harbor works for baseline purposes.⁴⁸

River Mouths. If a river flows directly into the sea without forming an estuary, the baseline is a straight line drawn across the mouth of the river between points on the low-water line of its banks.⁴⁹ If the river forms an estuary, the baseline is determined under the provisions relating to juridical bays.⁵⁰

Bays and Other Features

Juridical Bays. A “juridical bay” is a bay meeting specific criteria. Such a bay is a well-marked indentation on the coast whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation is not a juridical bay unless its area is as large as, or larger than, that of the semicircle whose diameter is a line drawn across the mouth of that indentation.⁵¹

For the purpose of measurement, the indentation is that area lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semicircle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation for satisfaction of the semicircle test.⁵²

If the distance between the low-water marks of the natural entrance points of a juridical bay of a single State does not exceed 24 miles, the juridical bay may be defined by drawing a closing line between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.⁵³ Where the distance between the low-water marks exceeds 24 miles, a straight baseline of 24 miles shall be drawn within the juridical bay in such a manner as to enclose the maximum area of water that is possible within a line of that length.⁵⁴

Historic Bays. The Territorial Sea Convention and the LOS Convention both exempt so-called historic bays from the rules described above.⁵⁵ To meet the standard of customary international law for establishing a claim to a historic bay, a State must demonstrate its open, effective, long-term, and continuous exercise of authority over the bay, coupled with acquiescence by foreign States in the exercise of that authority. An actual showing of acquiescence by foreign States in such a claim is required, as opposed to a mere absence of opposition.

Charts and Publication. Baselines are to be shown on large-scale nautical charts, officially recognized by the coastal State. Alternatively, the coastal State must provide a list of geographic coordinates specifying the geodetic datum.⁵⁶ Drying reefs used for locating basepoints are to be shown by an internationally accepted symbol for depicting such reefs on nautical charts.⁵⁷ The coastal State is required to give due publicity to such charts or lists of geographical coordinates, and deposit a copy of each such chart or list with the

Secretary-General of the United Nations.⁵⁸ Closure lines for bays meeting the semicircle test must be given due publicity, either by chart indications or by listed geographic coordinates.⁵⁹

Islands. Article 121(1) of the LOS Convention defines an island as a *naturally* formed area of land, surrounded by water, which is above water at high tide. Baselines are established on islands, and maritime zones are measured from those baselines in the same way as on other land territory. In addition, as previously indicated, there are special rules for using islands in drawing straight baselines and bay closing lines, and even low tide elevations (which literally do not rise to the status of islands) may be used as basepoints in specified circumstances. These special rules are not affected by the provision in Article 121(3) that rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf.

Artificial Islands and Off-shore Installations. Artificial islands, installations, and structures (including such man-made objects as oil-drilling rigs, navigational towers, and off-shore docking and oil-pumping facilities) do not possess the status of islands and may not be used to establish baselines, enclose internal waters, or establish or measure the breadth of the territorial sea, EEZ, or continental shelf.⁶⁰ Safety zones of limited breadth may be established to protect artificial islands, installations and structures and the safety of navigation in their vicinity.⁶¹

Roadsteads. Roadsteads normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly beyond the outer limits of the territorial sea, are included within the territorial sea.⁶² Roadsteads included within the territorial sea must be clearly marked on charts by the coastal State. Only the roadstead itself is territorial sea; roadsteads do not generate territorial seas around themselves; the presence of a roadstead does not change the legal status of the water surrounding it.⁶³

Almost fifty years ago, the International Court of Justice stated that delimitation of straight baselines “cannot be dependent merely upon the will of the coastal State as expressed in its municipal law . . . [T]he validity of the delimitation with regard to other States depends upon international

law.”⁶⁴ However, what nations do in the face of baseline claims inconsistent with international law is crucial. As two noted British scholars have stated:

[W]here a baseline is clearly contrary to international law, it will not be valid, certainly in respect of States which have objected to it, though a State which has accepted the baseline (for example in a boundary treaty) might be estopped from later denying its validity. In border-line cases—for example, where there is doubt as to whether a State’s straight baseline system conforms to all the criteria laid down in customary and conventional law—the attitude of other States in acquiescing in or objecting to the baseline is likely to prove crucial in determining its validity.⁶⁵

The MCRM and the views of the United States have assisted, and will continue to materially assist, all States in achieving the harmonization of domestic with international law envisioned by Article 310 of the Law of the Sea Convention. Jack Grunawalt can be proud of the what he has done over the past twenty-five years in that regard. We all are in his debt and renew our commitment to that end.

Jack, fair winds and following seas forever.

Notes

1. Captain Grunawalt served as Staff Judge Advocate to the Commander in Chief, U.S. Pacific Command between 1980 and 1984.

2. The Soviet naval base of Vladivostok lay deep within Peter the Great Bay facing the Sea of Japan near the northern border with North Korea.

3. MARJORIE WHITEMAN, 4 DIGEST OF INTERNATIONAL LAW 250–51 (1965) [hereinafter WHITEMAN].

4. II DEPT OF STATE, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981–1988, at 1811–12 (Marian Nash Leich ed., 1994); J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 49–51 (2d ed. 1996) [hereinafter ROACH & SMITH, RESPONSES]; J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 31–33 (66 International Law Studies, 1994). For earlier protests of this claim, see WHITEMAN, *supra* note 3, 251–257.

5. DEPT OF DEFENSE, MARITIME CLAIMS REFERENCE MANUAL, DoD 2005.1-M (1st ed. 1987, 2d ed. 1990, 3d ed. 1996).

6. Commentary enclosed with the Letter of Submittal of the Secretary of State, Sept. 23, 1994, S. TREATY DOC. No. 103-39, at 8 (1994) [hereinafter U.S. Commentary], reprinted in DEPT OF STATE, 6 DISPATCH Supp. No. 1, Feb. 1995, at 7-10; 34 I.L.M. 1393, 1402-1404 (1995); 7 GEO. INT’L ENVTL. L. REV. 93-97 (1994); and ROACH & SMITH, RESPONSES, *supra* note 4, at 543-551.

7. An earlier version of this paper appears in ROACH & SMITH, RESPONSES, *supra* note 4, at 57-74.

8. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261-1354 (1982) and in THE LAW OF THE SEA: OFFICIAL TEXT, U.N. Sales No. E.83.V.5, 1983 (entered into force Nov. 16, 1994) [hereinafter LOS Convention].

9. The baseline provisions of the 1982 LOS Convention are examined in OFFICE FOR OCEANS AFFAIRS AND THE LAW OF THE SEA, UNITED NATIONS, THE LAW OF THE SEA: BASELINES (U.N. Sales No. E.88.V.5*, 1989) [hereinafter U.N., BASELINES]. OFFICE FOR OCEANS AFFAIRS AND THE LAW OF THE SEA, UNITED NATIONS, BASELINES: NATIONAL LEGISLATION (1989), and ATLAS OF THE STRAIGHT BASELINES (Giampiero Francalanci *et al.* eds., 1986) also detail the baseline claims of the coastal and island States.

10. As noted in the Introduction to the recent UN study on baselines, “[h]istorically viewed as a body of law regulating movement—of vessels, products and people—the new law of the sea has become increasingly a law of appropriation—the assertion of national claims to large portions of the earth’s surface covered by the oceans.” U.N., BASELINES, *supra* note 9, at vii.

11. In depositing its instrument of ratification of the LOS Convention, the Netherlands declared “A claim that the drawing of baselines . . . is in accordance with the Convention will only be acceptable if such lines . . . have been established in accordance with the Convention.” DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, UNITED NATIONS, THE LAW OF THE SEA: DECLARATION AND STATEMENTS WITH RESPECT TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND TO THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982, at 36, U.N. Sales No. E.97.V.3 (1997). In depositing its instrument of accession to the LOS Convention, the United Kingdom declared that “declarations and statements not in conformity with articles 309 and 310 include . . . those which relate to baselines not drawn in conformity with the Convention.” U.N. Law of the Sea web site, Status of the Convention, Declarations (last visited Feb. 3, 1998) <http://www.un.org/Depts/los>.

12. Convention on the Territorial Sea and the Contiguous Zone, Geneva, Apr. 28, 1958, art. 3, 15 U.S.T. 1606, T.I.A.S. No. 639, 516 U.N.T.S. 205, [hereinafter Territorial Sea Convention]; LOS Convention, *supra* note 8, art. 5.

13. Definition 50, in Consolidated Glossary of Technical Terms used in the United Nations Convention on the Law of the Sea, International Hydrographic Bureau Special Pub. No. 51, A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea, 1982, Part I, *reprinted in* UN, BASELINES, *supra* note 9, at 58 [hereinafter Consolidated Glossary].

14. ROBIN R. CHURCHILL & ALAN V. LOWE, THE LAW OF THE SEA 46 (2d rev. ed. 1988).

15. LOS Convention, *supra* note 8, art. 6; U.N., BASELINES, *supra* note 9, ¶ 24. The International Hydrographic Organization Working Group on Technical Aspects of the Law of the Sea describes an “atoll” as “a ring-shaped reef with or without an island situated on it surrounded by the open sea, that encloses or nearly encloses a lagoon”; a “reef” as “a mass of rock or coral which either reaches close to the sea surface or is exposed at low tide”; and a “fringing reef” as “a reef attached directly to the shore or continental land mass, or located in their immediate vicinity.” Consolidated Glossary, *supra* note 13, app. I, definitions 9 & 66.

16. U.N., BASELINES, *supra* note 9, ¶¶ 35 & 38.

17. *Id.*, ¶¶ 38 & 39; CHURCHILL & LOWE, *supra* note 14, at 33 (while in some situations it would be impracticable to use the low-water line, “the effect of drawing straight baselines, even strictly in accordance with the rules, is often to enclose considerable bodies of sea as internal waters”). Professors Reisman and Westerman warn, “the chief practical effect of a straight baseline claim is to augment the areas of internal and territorial waters within state control. When individual baseline segments are very long, however, significant areas of continental shelf

and exclusive economic zone are also gained." W. MICHAEL REISMAN & GAYL S. WESTERMAN, STRAIGHT BASELINES IN INTERNATIONAL MARITIME BOUNDARY DELIMITATION 105 (1992).

18. U.S. Commentary, *supra* note 6, at 8; JOHN R. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 50 (1985); REISMAN & WESTERMAN, *supra* note 17, at xv.

19. REISMAN & WESTERMAN, *supra* note 17, at 77.

20. *Id.* at 90-91.

21. U.S. Commentary, *supra* note 6, at 9.

22. The LOS Convention does not specify how many deep indentations must exist in any locality on the coastline. Nevertheless, there must be noticeably more than one deep indentation in the locality, otherwise the juridical bay criteria would apply. While U.N., BASELINES, *supra* note 9, ¶ 36, suggests "several," three should be the minimum necessary to distinguish the situation from bays. There may also be one or more shallower cuts into the locality of the coastline.

23. The LOS Convention does not define "locality." This criterion, which combines the "cut into" and "deep indentation" requirements, coupled with the definition of "localities" *infra*, describe a "locality" where straight baselines may lawfully be drawn. The point at which the prescribed geographical criteria ceases to exist constitutes the limit of that particular "locality."

24. The LOS Convention does not define "deeply indented" except by comparison with Article 10 on bays. A bay is defined as a "well-marked indentation" of a specified proportion (the semi-circle test, see *infra*). Logical interpretation suggests that "deeply indented" sets a stricter geographical standard than that for a juridical bay. This criterion is designed to prevent shallow bays which do not meet the penetration criterion for juridical bays from being the basis for establishing a series of straight baseline segments in a particular locality (although some shallow indentations not being juridical bays in the locality of the deep indentations may in the process also be closed off as "cuts into" the coastline), while ensuring recognition that the purpose of straight baselines is not "to increase the territorial sea unduly." U.N., BASELINES, *supra* note 9, ¶ 39. It should be noted that the last sentence of paragraph 36 of U.N., BASELINES, incorrectly states that there is general agreement that *each* of the several indentations must be *juridical bays*.

25. Neither term is defined in the LOS Convention or in the IHO Glossary appended to U.N., BASELINES. The term "coastline" as used in Article 7 is clearly referring to the normal baseline defined in Article 5 as the "low-water line along the coast." U.N., BASELINES, *supra* note 9, ¶ 9, notes that "the low-water line is the intersection of the plane of low water with the shore." "Localities" is defined to make clear that each baseline segment is related to a particular geographic location.

26. Article 7 of the LOS Convention does not define a "fringe," or how close the islands must be to the mainland in the vicinity, or how close together the islands must be. The fringe must be made up of islands; low-tide elevations, artificial islands, reefs, roadsteads, or off-shore installations are not islands. The definition of island found in Article 121(1) of the LOS Convention is "a naturally formed area of land, surrounded by water, which is above water at high tide." Professors Reisman and Westerman suggest that a fringe of rocks which cannot sustain human habitation or economic life of their own [see Article 121(3)] should not qualify as a fringe of "islands," although they would permit rocks within the fringe of islands to be used as basepoints. REISMAN & WESTERMAN, *supra* note 17, at 85.

27. U.S. Commentary, *supra* note 6, at 9.

28. This first criterion addresses the maximum permissible seaward distance of the islands from the coastline in the vicinity. "In its immediate vicinity" clearly suggests that the distance will rarely exceed 24 miles since (a) open areas of high seas would lack the "close link" to the mainland necessary to justify a conversion to internal waters required by Article 7(3) of the LOS

Convention; (b) Article 8(2) preserves the right of innocent passage in waters closed off by straight baselines which had not previously been considered as such; and (c) Article 10(5) authorizes the use of a 24-mile straight baseline to enclose most of a juridical bay whose mouth is wider than 24 miles. *Accord* MUHAMMAD MUNAVVAR, OCEAN STATES: ARCHIPELAGIC REGIMES IN THE LAW OF THE SEA 121 (1995).

29. This second criterion addresses the maximum distances between islands to make up a fringe. Given the linkage to territorial waters described in the preceding endnote, it follows that, as a rule, no straight baseline segment should exceed 24 miles. Two 12-mile arcs drawn from appropriate low-water marks would be tangent at exactly 24 miles. A close spatial relationship between the various islands produces a barrier between the actual coast and the open sea and constitutes the justification for drawing a straight baseline in that locality. A scattering of islands, each far from the other, along a smooth and otherwise undistinguished coast does not qualify. Neither would a close constellation of an island cluster in a single place warrant a straight baseline. What is required is a distribution of islands close enough to each other to warrant that they fringe the coast. REISMAN & WESTERMAN, *supra* note 17, at 86-87. A fringe of islands meeting these two criteria will necessarily essentially parallel the coast. See U.N., BASELINES, *supra* note 9, ¶ 43, and REISMAN & WESTERMAN, *supra* note 17, at 86.

30. This criterion, drawn from paragraph 45 of U.N., BASELINES, provides an objective criterion for determining if the islands actually mask the coastline in the vicinity. "Masking" can be more objectively determined if the islands mask the majority of the mainland coastline in any given locality. Professors Reisman and Westerman believe the quantitative test for the number of islands should be "very high," approximating that found in the Norwegian skjaergaard. REISMAN & WESTERMAN, *supra* note 17 at 86.

31. LIMITS IN THE SEAS No. 106, DEVELOPING STANDARD GUIDELINES FOR EVALUATING STRAIGHT BASELINES 30-32 (1987).

32. The 24-mile maximum segment length is implied from a close reading of the relevant articles of the LOS Convention. Article 7(1) speaks of the "immediate vicinity" of the coast. Article 7(3) states that "the sea areas lying within the line must be sufficiently closely linked to the land domain to be subject to the regime of internal waters." In both of these descriptions, the implication is strong that the waters to be internalized would otherwise be part of the territorial sea. It is difficult to envision a situation where international waters (beyond 12 miles from the appropriate low-water line) could be somehow "sufficiently closely linked" as to be subject to conversion to internal waters.

This implication is reinforced by Article 8(2), which guarantees the right of innocent passage in areas converted to internal waters by straight baselines. Innocent passage is a regime applicable to the territorial sea (with a maximum breadth of 12 miles). Preservation of innocent passage carries over pre-existing rights in waters that were territorial in nature before the application of straight baselines.

Given this theme of linkage to territorial waters, it follows that, as a rule, no straight baseline segment should exceed 24 miles. Two 12-mile arcs from appropriate low-water marks would exactly overlap at 12 miles. Article 10(5) lends even further strength to this rule. Even in the case of a bay that meets the semicircle test, a closing line under Article 10 may not be drawn at the natural entrance points if those points are more than 24 miles apart. Article 10 permits only a 24-mile straight baseline within such a bay. This emphasizes the overriding importance of the 24-mile rule, even after satisfaction of the semicircle test.

Accord Finland Decree No. 464, Aug. 18, 1956, art. 4(2), (straight baseline segments shall be not longer than twice the width of the territorial sea), *translated in* LIMITS IN THE SEAS No. 48,

STRAIGHT BASELINES: FINLAND (1972). Cf. the *demarches* by Germany, on behalf of the European Union (EU) and endorsed by the acceding States (Austria, Finland, and Sweden):

(a) to Thailand concerning the announcement by the Prime Minister's Cabinet on August 17, 1992, of its straight baselines and internal waters in area 4 (*reprinted in* U.N., LOS BULL. No. 25, June 1994, at 8), in which the EU stated that "even if the United Nations Convention on the Law of the Sea does not set a maximum length for baseline segments, the segments determined by Thailand are excessively long. They are in fact 81 miles long between points 1 and 2, 98 miles long between points 2 and 3, and 60 miles long between points 3 and 4." U.N., LOS BULL. No. 28, at 31 (1995); and

(b) to Iran to the same effect. U.N., LOS BULL. No. 30, at 60 (1996). Iran's reply may be found in *id.*, No. 31, at 38 (1996).

33. U.S. Commentary, *supra* note 6, at 9. The Territorial Sea Convention, Article 4(2) and the LOS Convention, Article 7(3), specifically provide that straight baselines must not depart "to any appreciable extent from the general direction of the coast," and the sea areas they enclose must be "sufficiently closely linked to the land domain to be subject to the regime of internal waters." Professors Reisman and Westerman note that the coastal State must prove this linkage, and propose that it may be met through proof of geographical proximity, practice through time, and intensity of use. REISMAN & WESTERMAN, *supra* note 17, at 99–100.

34. This criterion recognizes that hard and fast rules will not always be acceptable for drawing straight baselines.

35. Territorial Sea Convention, *supra* note 12, art. 4(5); LOS Convention, *supra* note 8, art. 7(5); U.N., BASELINES, *supra* note 9, ¶ 58. The economic interests test is available only if the preliminary geographical requirements have been met. Thus, with the exclusive economic zone jurisdiction now available to all coastal States, no economic rationale can alone justify a straight baseline claim.

36. LOS Convention, *supra* note 8, art. 7(5); Territorial Sea Convention, *supra* note 12, art. 4(4). Consequently, the coastal State must advance historic economic data to establish this exception. Clearly, Article 7(5) does not refer to *potential* economic interests. Professors Reisman and Westerman suggest a test combining geographic proximity, practice through time, and intensity of past use. REISMAN & WESTERMAN, *supra* note 17, at 100–101.

37. U.N., BASELINES, *supra* note 9, ¶ 51. Article 7(1) of the LOS Convention provides that the straight baseline segments must join "appropriate basepoints." Those basepoints will be appropriate only if the segments drawn satisfy the delimitation rules of paragraphs 2 through 6 of Article 7. The Convention nowhere authorizes the use of abstract points at sea, described in terms of coordinates of latitude and longitude but otherwise failing the requirements of the Convention, as basepoints.

38. LOS Convention, *supra* note 8, art. 13(1); Territorial Sea Convention, *supra* note 12, art. 10(1).

39. The same rule appeared in the Territorial Sea Convention, *supra* note 12, art. 4(3).

40. This second exception is new and not contained in Territorial Sea Convention, Article 4(3). Professors Reisman and Westerman argue that this new authority cannot be used unless and until there is a substantial demonstration of the existence of widespread international recognition of the particular low-tide elevation lacking a lighthouse as a basepoint. REISMAN & WESTERMAN *supra* note 17, 93–94.

41. U.S. Commentary, *supra* note 6, at 10; REISMAN & WESTERMAN, *supra* note 17, 93–94. See MUNAVVAR, *supra* note 28, at 125.

42. The comparable provision in the Territorial Sea Convention appears in Article 4(5). An example of state practice complying with this rule is the French baseline decree of October 19,

1967, which provides for noncontinuous segments leaving Monaco with unrestricted oceans seaward. 7 I.L.M. 347 (1968); LIMITS IN THE SEAS No. 37, STRAIGHT BASELINES: FRANCE (1972). The Spanish enclaves of Cueva and Melilla and the Islas Chafarinas almost completely enclosed within Moroccan straight baselines are another example. FARAJ ABDULLAH AHNISH, THE INTERNATIONAL LAW OF MARITIME BOUNDARIES AND THE PRACTICE OF STATES IN THE MEDITERRANEAN SEA 190–193 (1993).

43. The same rule appeared in the Territorial Sea Convention, *supra* note 12, art. 5(2). An example of this situation is the Piombino Channel between the Italian Island of Elba (the main island of the Tuscany archipelago) and the Italian mainland, which connects two parts of the high seas, while lying entirely within Italian internal waters as defined by Italy's 1977 straight baseline decree. Tullio Scovazzi, *Management Regimes and Responsibility for International Straits, with Special Reference to the Mediterranean Straits*, 19 MARINE POL'Y 137, 151 (1995).

44. LOS Convention, *supra* note 8, art. 7(2). Applicable deltas include those of the Mississippi and Nile Rivers, and the Ganges-Brahmaputra River in Bangladesh. U.N., BASELINES, *supra* note 9, ¶ 50; PRESCOTT, *supra* note 18, at 15; REISMAN & WESTERMAN, *supra* note 17, at 101–102.

45. Territorial Sea Convention, *supra* note 12, art. 11; LOS Convention, *supra* note 8, art. 13.

46. LOS Convention, *supra* note 8, art. 14. There is no corresponding provision in the 1958 Territorial Sea Convention. Article 14 does not permit a coastal State to draw straight baselines in a locality not meeting the required geographic criteria; in those circumstances, the low-water line must be followed. See U.N., BASELINES, *supra* note 9, ¶¶ 31–32. Closing lines are discussed *infra*.

47. Territorial Sea Convention, *supra* note 12, art. 8; LOS Convention, *supra* note 8, art. 11; IHO Definition 38, in U.N., BASELINES, *supra* note 9, at 56; U.N., BASELINES, *supra* note 9, ¶ 76. Professors Reisman and Westerman would add a prohibition against the use of atolls and fringing reefs as basepoints for straight baseline segments along the coast or around the islands. REISMAN & WESTERMAN, *supra* note 17, at 94.

48. LOS Convention, *supra* note 8, art. 11.

49. Territorial Sea Convention, *supra* note 12, art. 13; LOS Convention, *supra* note 8, art. 9. The fact that the river must flow “directly into the sea” suggests that the mouth should be well marked.

50. See the 1956 I.L.C. draft of what became Article 13 of the Territorial Sea Convention (the predecessor of Article 9 of the LOS Convention), U.N. Doc. A/3159, II Y.B.I.L.C. 1956, at 253, 271, and IHO Definition 54, in U.N., BASELINES, *supra* note 9, at 59. An estuary is the tidal mouth of a river, where the tide meets the current of fresh water. IHO Definition 30, in *id* at 54. The Conventions do not state exactly where, along the banks of estuaries, the closing points should be placed. No special baseline rules have been established for rivers entering the sea through deltas, such as the Mississippi, (*i.e.*, either the normal or straight baseline principles above may apply) or for river entrances dotted with islands. The Territorial Sea and LOS Conventions place no limit on the length of river closing lines. Further, the Conventions do not address ice coast lines, where the ice coverage may be permanent or temporary.

51. Territorial Sea Convention, *supra* note 12, art. 7(2); LOS Convention, *supra* note 8, art. 10(2).

52. Territorial Sea Convention, *supra* note 12, art. 7(3); LOS Convention, *supra* note 8, art. 10(3).

53. Territorial Sea Convention, *supra* note 12, art. 7(4); LOS Convention, *supra* note 8, art. 10(4).

54. Territorial Sea Convention, *supra* note 12, art. 7(5); LOS Convention, *supra* note 8, art. 10(5). The waters enclosed by a baseline of a wide-mouth bay need not meet the semicircle test, since the wide mouth bay as a whole must meet that test to be a juridical bay. In this case, there is no requirement to draw the closing line between prominent points; they can be fixed on smooth coasts. PRESCOTT, *supra* note 18, at 60. Historic bays, bays bounded by more than one State, and bays converted to internal waters by straight baselines under Article 7, are not covered by Article 10.

55. Territorial Sea Convention, *supra* note 12, art. 7(6); LOS Convention, *supra* note 8, art. 10(6).

56. LOS Convention, *supra* note 8, art. 16(2). This rule applies to both normal and straight baselines. Under the Territorial Sea Convention, Article 4(6), only straight baselines were required to be clearly shown.

57. LOS Convention, *supra* note 8, art. 6. There is no corresponding provision in the 1958 Territorial Sea Convention.

58. *Id.*, art. 16(2). The Territorial Sea Convention also required due publicity in Articles 4(6) (straight baselines) and 9 (roadsteads). See U.N., BASELINES, *supra* note 9, ¶¶ 2–8, 29 & 94–102.

59. LOS Convention, *supra* note 8, art. 16.

60. *Id.*, arts. 11, 60(8), 147(2) & 259.

61. The criteria for establishing safety zones are set out in LOS Convention, *supra* note 8, arts. 60, 177(2) and 260.

62. LOS Convention, *supra* note 8, art. 12.

63. U.S. Commentary, *supra* note 6, at 13.

64. Anglo-Norwegian Fisheries Case, (U.K. v. Nor.) 1951 I.C.J. Rep. 132.

65. CHURCHILL & LOWE, *supra* note 14, at 46–47.

X

The Principle of the Military Objective in the Law of Armed Conflict

Horace B. Robertson, Jr.

IN THEIR COMMENTARY on the two 1977 Protocols Additional to the Geneva Conventions of 1949, Michael Bothe, Karl Josef Partsch, and the late Waldemar A. Solf remark that the definition of the “military objective” in the sense of targets for attack had, until adoption of Article 52 of Additional Protocol I,¹ “eluded all efforts to arrive at a generally acceptable solution.”² This is surprising in that the principle of distinction, from which the principle of the military objective is derived, is one of the two “cardinal principles” of the law of armed conflict.³ The principle of distinction itself, although an inherent part of both customary and conventional law governing the conduct of war, did not receive precise articulation in a treaty document until adopted in Additional Protocol I, which states in Article 48 that:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Development and Articulation of the Principle of the Military Objective

Despite some embryonic intimations of the emergence of the principle in the period of medieval Canon law,⁴ the chivalric codes of the international order of knighthood, and the early war codes of certain European States,⁵ the modern articulation of the principle of distinction had its origins in the late 19th and early 20th centuries, probably under the influence of Rousseau's proclamation that wars were disputes between States and not between peoples. Consequently, military operations were to be conducted exclusively between combatants in uniform, and unarmed civilians were to be spared in their persons and property.⁶

The principle of distinction had its first formal recognition as such in Professor Francis Lieber's Instructions promulgated to the Federal Forces in the United States Civil War by President Lincoln.⁷ Included among its provisions is a recognition that in remote times the universal rule was, "and continues to be with barbarous armies," that civilians and their property were subject to any privation the hostile commander chose to impose.⁸ But the Instructions also recognize that as civilization has advanced,

so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.⁹

The Declaration of Petersburg of 1868¹⁰ tacitly recognized the principle, stating in its Preamble that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy." This sentiment was also expressed in the Final Protocol of the Brussels Conference of 1874.¹¹

The *Oxford Manual* of 1880, in its first article, states, "The state of war does not admit of acts of violence, save between the armed forces of belligerent States."¹² An explanatory statement immediately following the article notes that "[t]his rule implies a distinction between the individuals who compose the 'armed force' of a State and its other *ressortissants* [nationals]."¹³ Despite these advances toward adoption of the principle of distinction in a conventional instrument, the Hague Conventions of 1907 gave only limited and implied respect to the principle. Without specific reference to the principle of distinction or the concept of the military objective, a number of provisions

explicitly require respect for the person and property of noncombatants. Article 25 of the Regulations Annexed to Hague IV¹⁴ prohibits bombardment of undefended places in land warfare, as does Article 1 of Hague IX for naval bombardments.¹⁵ In both land and naval bombardments, the commander ordering the bombardment is normally required to give notice prior to the start of the bombardment.¹⁶ In both cases, the commander must take all necessary steps to spare, "as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes."¹⁷ Proscriptions against harming inhabitants and taking their property without compensation are found in a number of places in Hague IV.¹⁸

The first explicit reference to the "military objective" as a concrete rule of warfare is found in the *Hague Rules of Air Warfare* of 1923.¹⁹ Article 24(1) of the Rules states:

Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

Although the *Hague Rules* were never adopted in a treaty instrument, Lauterpacht states that they are regarded "as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war and they will doubtless prove a convenient starting point for any future steps in this direction."²⁰ At least insofar as the definition of "military objective" contained in the rules is concerned, Lauterpacht's prediction was, as we shall later see, prescient.

Although the international community undertook a major effort in 1949 to bring up to date the international rules for the protection of the victims of armed conflict, the project was directed primarily to the protection of the victims of war and did not include an attempt to modernize the *Hague Rules* or other conventions dealing with the means and methods of warfare.²¹ As a consequence, the International Committee of the Red Cross (ICRC), in an effort to fill what it believed was a gap in the humanitarian law of armed conflict, prepared Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. The Draft Rules were submitted to the XIXth International Conference of the Red Cross in New Delhi in 1957, which approved them in principle.²² When governments failed to follow up on the draft, the ICRC, at the XXth Conference in Vienna in 1965, proposed the

reaffirmation of certain basic principles, which were adopted as Conference Resolution XXVIII. The resolution provided, *inter alia*:

All governments and other authorities responsible for action in armed conflicts should conform at least to the following principles: . . . that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.²³

Soon thereafter the General Assembly of the United Nations became interested in the efforts of the ICRC and adopted a series of resolutions along the lines of Resolution XXVIII, the most significant, insofar as our subject is concerned, being Resolution 2675 (XXV). It stated that the General Assembly affirmed certain basic principles of the law of armed conflict, including:

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

...

4. Civilian populations as such should not be the object of military operations.²⁴

These movements toward a codification of the principle of distinction and defining the military objective received further impetus from a resolution adopted by the Institute of International Law at Edinburgh in 1969. This Resolution reaffirmed the "fundamental principle" of the obligation of parties to observe the principle of distinction and defined military objectives as only those objects,

which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.²⁵

The culmination of efforts by the ICRC and others to modernize and amplify the 1949 Geneva Conventions was the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), convened by the Swiss Government

in 1974. The Conference met in four annual sessions and in 1977 adopted two Additional Protocols to the Geneva Conventions of 12 August of 1949. The first is applicable to international armed conflicts and the second to non-international armed conflicts. Only the former is of interest to us in that it contains explicit provisions concerning the principle of distinction and the concept of the military objective.²⁶

As a result of the deliberations of the CDDH, the international community has for the first time in a treaty document adopted a specific and explicit articulation of the principle of distinction and its derivative principle of the military objective. Additional Protocol I (as of September 1997) has now entered into effect for 148 States.

Although some aspects of the two principles are reflected in a number of articles in Additional Protocol I,²⁷ they are expressly set forth in two articles, Article 48, set forth above, and Article 52. The latter reads as follows:

Article 52 - General protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.²⁸

It is noteworthy in the foregoing articulation of the definition of the military objective that it follows closely the definition contained in Article 24 of the 1923 *Hague Rules of Air Warfare*, although it is amplified in several respects, reflecting particularly the additional ideas expressed in the Edinburgh Resolution of the Institute of International Law.²⁹ Article 52, in essence, provides a two-pronged test for whether objects are military objectives. The first prong is that they must, by their "nature, location, purpose or use," make an effective contribution to military action. The second is that their total or partial destruction, capture or neutralization must, in the prevailing circumstances, offer a definite military advantage.

It should also be noted that in Additional Protocol I, the words "whose total or partial destruction, capture or neutralization" have replaced "destruction and injury," and the words "substantial, specific and immediate" of the Edinburgh Resolution have been replaced by the less specific "definite."

The term “attacks” is also used in a broader sense than is traditionally meant in military parlance, where the term was generally used to describe the use of military force in an offensive action, particularly the launching of weapons against the enemy. As defined in Article 49, “ ‘Attacks’ means acts of violence against the adversary, whether in offense or in defense.”

Although the section of Additional Protocol I concerned with attacks does not apply to naval warfare, except insofar as attacks from the sea or air may affect the civilian population, individual civilians, or civilian objects on land,³⁰ many modern navies have the capability and are often employed to conduct attacks on land targets by naval artillery or missiles or by their air arms. Thus, this section of the Protocol is explicitly applicable to this aspect of naval warfare.

For armed conflict at sea generally, however, there has been no modern counterpart to the codification effort reflected in the events leading up to and the convening of the Diplomatic Conference which resulted in the two Additional Protocols of 1977. Consequently, there has been no explicit incorporation of the principle of the military objective into conventional law applicable to armed conflicts at sea. The closest approach to that process has been the series of Round Tables convened by the International Institute of Humanitarian Law of San Remo, Italy, from 1988 to 1994, whose purpose was to provide a contemporary restatement of international law applicable in armed conflicts at sea.³¹ The *Manual* that resulted from the deliberations of the Round Tables was not envisaged as a draft convention but was viewed by participants in the Round Tables as a modern equivalent of the *Oxford Manual* on the Laws of Naval War Governing the Relations between Belligerents adopted by the Institute of International Law at Oxford in 1913.³² The *San Remo Manual* adopts essentially *in haec verba* the definitions of the principle of distinction and the military objective found in Additional Protocol I. The relevant provisions are included in a section entitled “Basic Rules” and provide that:

- 39 Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives.
- 40 In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

- 41 Attacks shall be limited strictly to military objectives. Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document.

The Principle of the Military Objective as a Part of the Customary Law of War

Since the United States has not ratified Additional Protocol I, and the *San Remo Manual* does not of itself have any binding effect on States, it is necessary to examine whether the principles of distinction and the military objective have become rules of customary international law and, in particular, whether the United States recognizes them as such. To state the proposition another way, are the provisions of Additional Protocol I and the *San Remo Manual* articulating the principles of distinction and the military objective declaratory of international law? If they are, then they are binding on States not party to the Protocol, not as treaty obligations but as customary norms of identical content.

According to the *Restatement*, customary international law results from a concurrence of two elements: (1) a general and consistent practice of States; and (2) a sense of obligation on the part of States to adhere to the practice.³³

With respect to the first element (practice), acts which may constitute State practice include diplomatic instructions, public measures, and official statements of policy. They may also include acquiescence in acts of another State.³⁴ The practice required to establish a norm of customary law must be general, but not necessarily universal. It should reflect "wide acceptance among the states particularly involved in the relevant activity."³⁵ As to deviations from the practice, the U.S. Navy's *Commander's Handbook on the Law of Naval Operations* states:

Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance, observance, and enforcement continue to be the norm. However, repeated violations not responded to by protests, reprisals, or other enforcement actions may, over time, indicate that a particular rule is no longer regarded as valid.³⁶

With respect to the second element (sense of obligation or *opinio juris*), explicit evidence of a sense of obligation is not necessary, but is certainly helpful. Some of the same "acts" that demonstrate a general practice also serve to indicate that a State is acting out of a sense of obligation and not just as a matter of courtesy or habit.³⁷ With respect to the law of armed conflict,

inclusion of a rule in a State's military manuals is persuasive evidence that the State regards the rule as obligatory.³⁸ Statements by government officials, even those spoken in their private capacities, are helpful. A noted authority and judge of the International Court of Justice has stated:

The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.³⁹

A number of statements, both official and unofficial, by spokesmen for the United States Departments of State and Defense, spoken primarily in the context of an examination of Additional Protocol I and the U.S. decision not to ratify it, have suggested that the U. S. regards the principles of distinction and the military objective, as articulated in the Protocol, as customary international law.⁴⁰

Most persuasive insofar as the United States is concerned is the opinion of the General Counsel of the Department of Defense, concurred in by the Army, Navy, and Air Force Judge Advocates General, that the United States recognized as "declaratory of existing customary international law" the general principles of the law of armed conflict stated in General Assembly Resolution 2444.⁴¹ Those principles include:

(b) That it is prohibited to launch attacks against the civilian population as such, and

(c) That a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible.⁴²

As we have seen, incorporation in national military manuals is a strong indication that a normative principle has matured into customary international law.⁴³ Here, too, the strong indications from military manuals are that the principle of the military objective, as formulated in Articles 48 and 52 of Additional Protocol I and paragraphs 39 and 40 of the *San Remo Manual*, is recognized as a norm of customary international law. The current German military manual provides:

441. Attacks, i.e., any acts of violence against the adversary, whether in offence or in defence, shall be limited exclusively to military objectives.

442. Military objectives are armed forces—including paratroops in descent but not crew members parachuting from an aircraft in distress—and objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction or neutralization, in the circumstances ruling at the time, offer a definite military advantage.⁴⁴

The *Australian Operations Law Manual* for air commanders contains similar provisions:

An aerial attack must be directed against military objectives. . . . Military objectives are those objects which by their nature, location, purpose or use make an effective contribution to military action. To be lawful, any attack on such objective should result in a definite military advantage.⁴⁵

The *Canadian Draft Manual* also adopts the Protocol definition of military objective essentially verbatim. It provides:

Military objectives are combatants and in so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁴⁶

Two United States manuals are also pertinent to our inquiry, those of the Air Force and Navy/Marine Corps/Coast Guard.⁴⁷ Although predating the actual signing of Additional Protocol I by one year, the United States Air Force operational law manual apparently took into account the ongoing negotiations in the CDDH, for its provisions on the principle of distinction and the military objective are taken almost verbatim from the final provisions of the Protocol. It provides:

In order to insure respect and protection for the civilian population and civilian objects the parties to the conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives. Attacks must be strictly limited to military objectives. Insofar as objects are concerned, military objectives are limited to those objects which by their own nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization in the circumstances ruling at the time offers a definite military advantage.⁴⁸

The *Navy/Marine Corps/Coast Guard Manual*, the most recent revision of which is dated 1995, although pointing out that the United States is not a party to Additional Protocol I,⁴⁹ nevertheless has also adopted, with one variation, the Protocol formulation of the principle of the military objective. It states, in a chapter entitled "The Law of Targeting":

Only military objectives may be attacked. Military objectives are combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's *war-fighting or war-sustaining capability* and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.⁵⁰

The emphasized part of the foregoing quotation was the object of considerable debate in the San Remo Round Table, which specifically rejected it in favor of the formulation in article 52 of Additional Protocol I. As stated by Louise Doswald-Beck, who acted as rapporteur for the sessions of the Round Table and was the editor of the "*Explanation*" of the *San Remo Manual*,

The majority [of the Round Table] felt that the *Handbook* does not take into account developments in the law relating to target discrimination since the Second World War. In particular, they feared that "war-sustaining" could too easily be interpreted to justify unleashing the type of indiscriminate attacks that annihilated entire cities during that war.⁵¹

An annotation to a previous edition of the *Commander's Handbook* stated that, "This variation of the definition contained in Additional Protocol I, Article 52(2) is not intended to alter its meaning, and is accepted by the United States as declarative of the customary rule."⁵² In the new revision of the *Annotated Supplement*, the annotation is revised to state that, "This definition is accepted by the United States as declarative of the customary rule."⁵³ The inference that one may draw from this change in wording is that the United States (at least its naval arm) has rejected the presumptively narrower definition contained in Article 52 of Additional Protocol I in favor of one that, at least arguably, encompasses a broader range of objects and products. In justifying this position, the *Annotated Supplement* cites the American Civil War-era decision of the United States with respect to the destruction of raw cotton within Confederate territory, the sale of which provided funds for almost all Confederate arms and ammunition, as well as the twelve "target sets" for the offensive air campaign of Operation Desert Storm.⁵⁴ The text of the *Handbook* itself states that, "Economic targets of the enemy that indirectly but

effectively support and sustain the enemy's war-fighting capability may also be attacked."⁵⁵

From the foregoing, it would appear that there is a consensus, in which the United States concurs, that the principle of the military objective has become a part of customary international law for armed conflict at sea, as well as on the land and in the air. We shall in the next section examine what objects the term "military objective" embraces and attempt to discern whether the variation in terminology in the U.S. naval manual does in fact suggest a broadening of the scope of permissible targets for attack.

The "Reach" of the Term, "Military Objective"

In earlier centuries, when wars were generally fought with limited objectives and the cleavage between armed forces and the civilian population was clear, the distinction between military objectives and civilian objects was reasonably apparent. Only in the immediate vicinity of the battle was the civilian populace put in jeopardy by the fire of the contending armed forces. The problem of protecting objects which were not legitimate military objectives could be met by prohibitory rules exempting particular categories of objects, buildings, or installations such as churches, hospitals, buildings used for charitable or scientific purposes, etc. This was the pattern followed in the *Hague Rules*, for example.⁵⁶ In modern warfare, however, with the tremendous increase in the range and sophistication of weapons and with the mobilization of the populace in support of modern armies, navies, and air forces, the cleavage is not nearly so distinct. In the two World Wars of this century, the economies of all of the major parties involved were completely mobilized in support of the war effort. Nearly all industries were converted to war production; all power-generating stations provided power for war industries; and the bulk of the adult population was engaged in some activity connected with the war effort. At the same time, the capabilities of the contending forces to strike targets deep in enemy territory, primarily through their air forces, were vastly expanded. As a result, both Allied and Axis powers conducted "strategic" bombing campaigns against the industrial bases of their enemies which, because of the limitations at that time on the accuracy of nighttime and high-altitude bombing, could hardly be said to have discriminated between valid military objectives and the civilian population and civilian objects in the vicinity of the military objective that was the target of the bombing.⁵⁷

Nevertheless, most twentieth-century international conflicts, particularly those occurring since World War II, have not been of the magnitude and

geographic scale of the two World Wars. Most were undeclared and fought with limited objectives. Although geographically confined to relatively small areas, the fighting was just as intense as in the two World Wars. The Korean, Vietnam, and Gulf Wars in which the United States was engaged were certainly intense but had little if any physical effect on populations and objects outside the immediate area of conflict. The Falklands/Malvinas war between Great Britain and Argentina was likewise limited. The differences in the intensity and scope of conflicts have led some commentators to suggest that there should be a flexible definition of the military objective, allowing it to expand and contract “according to the intensity, duration, subjects, and location of the armed conflict.”⁵⁸ Both Additional Protocol I and the *San Remo Manual* reject this idea, providing that the same criteria apply in general and limited wars, although the *San Remo Manual* “Explanation” recognizes that “the application of these rules to the facts should result in a more restrictive approach to targeting in limited conflicts.”⁵⁹

Rather than follow the traditional pattern of establishing prohibitory rules setting forth what objects were to be protected from hostile action, however, the conference at which the 1977 Additional Protocols were negotiated adopted a formula that provides criteria by which a responsible military commander can determine, under the circumstances existing at the time, which objects are legitimate targets for attack. As we have seen earlier, this resulted in the two-pronged test of Article 52, namely, that, to constitute military objectives, objects must, by their “nature, location, purpose or use” make an effective contribution to military action and that their total or partial destruction, capture, or neutralization must, in the prevailing circumstances, offer a definite military advantage. Since this approach was a departure from the traditional practice of writing prohibitory rules specifying which objects were to be spared, it met considerable opposition at the outset of the negotiations in the CDDH.⁶⁰ This opposition was eventually overcome by inclusion of the first sentence of Article 52, which, in the traditional codification pattern, is prohibitory in nature, albeit without listing exempt objects specifically. The second sentence, upon which we shall focus our discussion, gives the commander a two-prong test for determining which targets are legitimate.

The first prong of the Article 52 test, as well as the San Remo test, states four conditions—nature, location, purpose, use—which, if they make an effective contribution to military action, make an object a military objective. Some objects, “by their nature,” are military objectives and remain so at all times, regardless of their location or use. Examples of such objects include enemy

warships, military aircraft (unless exempt under some specific exception such as those applicable to medical transports), stocks of ammunition, and combatant personnel.⁶¹ On the other hand, the vast majority of objects become military objectives only during the time that their particular location, purpose, or use provides an effective contribution to military action. Civilian buildings, for example, may become military objectives if they are being used by enemy troops for shelter. Their “location” may make them military objectives if they obstruct the field of fire for attack on another valid military objective. Factories making civilian goods are not normally military objectives, but if they are converted to manufacture war goods, their purpose and use may make them military objectives. The *ICRC Commentary* suggests that “*purpose* is concerned with the intended future use of an object, while that of *use* is concerned with its present function.”⁶² Civilian transportation hubs may also be important military transportation links, and their dual use (civilian/military) does not exempt them from becoming military objectives, although under these circumstances the time of attack should be taken into account to minimize civilian casualties.⁶³ Bothe et al. state succinctly:

The objects classified as military objectives under this definition include much more than strictly military objects such as military vehicles, weapons, munitions, stores of fuel and fortifications. Provided the objects meet the two-pronged test, *under the circumstances ruling at the time* (not at some hypothetical future time), military objectives include activities providing administrative and logistical support to military operations such as transportation and communications systems, railroads, airfields and port facilities and industries of fundamental importance for the conduct of the armed conflict.⁶⁴

The second aspect of the first prong of the test which must be examined is whether the nature, location, purpose, or use of the object makes an effective contribution to “military action.” As we saw above, the U.S. naval *Commander’s Handbook* substitutes the phrase “enemy’s war-fighting or war-sustaining capability” for “military action.” Is there an actual substantive difference in meaning, or is there merely a difference in perception?

Any difference between the two formulations would seem to come down to the term “war-sustaining” in the *Commander’s Handbook*. The term “war-fighting” is equivalent to the Additional Protocol I term “military action.” On the other hand, “war-sustaining” implies something not quite so directly connected with the actual conduct of hostilities.

The San Remo Round Table specifically addressed the issue of whether to adopt the formulation used in Article 52(2) of Additional Protocol I or that contained in the *Commander's Handbook*. It concluded that the *Handbook's* phrasing was too broad and might justify indiscriminate attacks on entire cities.⁶⁵ The suggestion that the latter formulation might justify attacks on entire cities seems to be an exaggerated claim. Nowhere in the *Commander's Handbook* is there any suggestion that this phrasing would open the way for unrestricted attacks on cities or other population centers. In discussing what objects are included within its definition, the *Manual* states that in addition to targets having obvious military value, military objectives may include:

enemy lines of communication used for military purposes, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.

This explanation does not differ materially from the authoritative interpretation of Article 52(2) by Bothe et al., who suggest:

Military objectives must make an "effective contribution to military action." This does not require a direct connection with combat operation such as is implied in Art. 51, para. 3, with respect to civilian persons who lose their immunity from direct attack only while they "take a direct part in hostilities." Thus a civilian object may become a military objective and thereby lose its immunity from deliberate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military phase of a Party's overall war effort.⁶⁶

The *San Remo Manual*, although adopting the Article 52(2) phrasing, nevertheless acknowledged that a civilian object may become a military objective and thereby lose its immunity from

deliberate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military part of a party's overall war-fighting capability.⁶⁷

Probably the only point of difference between the San Remo formulation (which adopts the Article 52(2) phrasing) and that in the *Commander's Handbook* is with respect to attacks on exports that may be the sole or principal

source of financial resources for a belligerent's continuation of its war effort. In support of the possible legitimacy of such attacks, the *Commander's Handbook* cites the denial of claims for destruction of British-owned cotton exports from the Confederacy during the American Civil War by an Anglo-American arbitration tribunal.⁶⁸ It also raises the question whether Iraq's attacks on tankers carrying oil from Iran during the 1980-88 Gulf War may have been justified under the same theory, although it admits that the law on this subject "is not firmly settled."⁶⁹

The San Remo Round Table, however, firmly rejected the broadening of the military objective to include such targets, "because the connection between the exports and military action would be too remote."⁷⁰

The second prong of the two-part test provided in Article 52(2)—that the total or partial destruction, capture, or neutralization of the object, in the circumstances ruling at the time, offers a definite military advantage—although incorporated in *haec verba* in the various national manuals and the *San Remo Manual*, has received little attention from commentators. Bothe et al. provide the seminal commentary on the subject, stating:

The term military advantage involves a variety of considerations, including the security of the attacking force. Whether a definite military advantage would result from an attack must be judged in the context of the military advantage anticipated from the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts of that operation. It is not necessary that the contribution made by the object to the Party attacked be related to the advantage anticipated by the attacker from the destruction, capture or neutralization of the object.⁷¹

Although Article 51, paragraph (1)(b) and Article 57, paragraph 2(a)(iii) use the more restrictive term "concrete and direct" military advantage, the documents of the CDDH do not disclose the reasons for using different expressions.⁷² Examining the context of the expressions in the three articles, however, it appears that the purpose of using the arguably more restrictive phrase, "concrete and direct," in Articles 51 and 57 was to provide a less subjective test for applying the rule of proportionality where there was a danger of civilian casualties or damage to civilian objects in a projected attack.⁷³ On the other hand, Article 52, paragraph 2 is concerned only with defining what objects are military objectives. Of course, should the attack on a legitimate military objective involve the possibility of collateral damage to civilians or civilian objects, the arguably more stringent restriction would apply.

The Application of the Principle of the Military Objective to Armed Conflict at Sea

As we have seen above, the term “military objective” received no precise definition in a treaty document until 1977, when Additional Protocol I included one for armed conflict on land (and for attacks on land targets by naval or air forces).⁷⁴ Although this definition does not apply of its own force to States not party to the 1977 Protocol, we have also seen that the principle of the military objective, essentially as articulated in the Protocol, has been acknowledged to have been assimilated into customary international law.⁷⁵ There also seems to be no question that it is also a principle of the law of armed conflict applicable to armed conflict at sea.⁷⁶

Despite its relatively recent articulation in its present terminology as a concrete principle of the law of armed conflict at sea,⁷⁷ the concept of the military objective, often referred to as the “law of targeting” or a subdivision thereof,⁷⁸ is reflected in many of the customary rules that have developed in the conduct of naval warfare over the past two centuries—particularly those that apply to what has come to be known as economic warfare.

Just as in land warfare, in warfare at sea, whether a person or object is a legitimate object of attack or is protected from attack depends, in the case of persons, on whether they are combatants or noncombatants (or civilians in the words of Additional Protocol I), and in the case of objects, on whether or not they make an effective contribution to the enemy’s war effort (military action in the words of Protocol; war-fighting or war-sustaining capability in the words of the *Commander’s Handbook*). Prior to the twentieth century, the distinction was relatively clear. Warships and naval auxiliaries were legitimate objects of attack. Merchant ships and their crews, whether enemy or neutral, were not.

On the other hand, private property at sea had never had the protection from seizure by the enemy that it enjoyed in land warfare. Under the doctrines of blockade and contraband, goods destined for (and in the case of blockade, being shipped from) an enemy port were subject to capture and condemnation by prize courts. The traditional method of enforcing these doctrines was to stop a suspect merchantman and exercise the right of visit and search. Only if the vessel resisted visit and search, was sailing in an enemy convoy, or attempted to run a blockade was it subject to attack.

The advent of the submarine and aircraft and the measures adopted by the adversaries to counteract these new means of naval warfare changed the traditional law forever and irrevocably. Neither submarines nor aircraft were capable of conducting visit and search in the traditional manner. As a

consequence, in World War I, German submarines (and to a limited extent aircraft) attacked enemy and neutral merchant ships without warning. The Allied forces in turn armed their merchantmen, formed them into escorted convoys, and generally incorporated their merchant fleets into the war effort. During the interwar period, the former Allied States sought to outlaw the use of submarines as commerce raiders through a series of diplomatic moves, culminating in the London Protocol of 1936,⁷⁹ which purported to apply the same rules to submarines that were applicable to surface warships. These diplomatic efforts proved fruitless, however, and World War II saw a repetition of the practices of World War I in an even more widespread and cruel manner.⁸⁰

As a result of the practices of both the Axis and Allied powers in World War II, and the assessment of those practices by the Nuremberg Tribunal in the case of Admiral Karl Doenitz,⁸¹ a consensus seems to have been achieved among publicists and national military manuals that although the 1936 London Protocol retains its validity, the realities of modern warfare, particularly global warfare, make it inapplicable in most situations. This consensus is perhaps best expressed in the recent *San Remo Manual*, which provides that enemy merchant ships may be attacked only if they have become military objectives and states that the following activities may render them military objectives:

- (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
- (b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;
- (c) being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
- (d) sailing under convoy of enemy warships or military aircraft;
- (e) refusing an order to stop or actively resisting visit, search or capture;
- (f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defense of personnel, e.g., against pirates, and purely deflective systems such as 'chaff';

- (g) otherwise making an effective contribution to military action, e.g., carrying military materials.⁸²

Other manuals state the rules somewhat differently, but in essence prescribe similar standards.⁸³

The *San Remo Manual* treats neutral merchant vessels separately, excluding being armed from the list of activities rendering them military objectives and adding refusal to stop or resisting visit, search, and capture.⁸⁴ The *Manual* explicitly states that the mere fact that a neutral vessel is armed does not provide ground for attack.⁸⁵ The U.S. manual is the most permissive of the manuals examined in that it includes, as a final activity, authorizing attack on enemy merchant vessels: . . . “If integrated into the enemy’s war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.”⁸⁶ This latter provision has been subjected to severe criticism by Frits Kalshoven, who points out that the adoption of Additional Protocol I in 1977 vindicated the view, at least for land warfare, that contribution to the “war effort” is too broad a test for determining whether an object has become a military objective. He suggests that the same should be true in naval warfare.⁸⁷

When the development of aircraft technology reached the point at which air transportation became a factor in international commerce, the international community attempted to adopt the same principles for civil aircraft that were applicable to merchant ships. This was first manifested in the 1923 *Hague Rules of Air Warfare*,⁸⁸ which, with respect to civil aircraft, closely mimic the rules applicable to merchant ships.⁸⁹ Although the *Hague Rules* were never adopted in binding form, they have influenced the development of the law in this field, and the military manuals generally follow the pattern established in 1923. They have likewise adopted the view that activities conducted by them similar to those that would make merchant ships military objectives would also convert civil aircraft into military objectives. Again, turning to the *San Remo Manual* as the typical manifestation of this pattern, it provides that aircraft engaging in any of the following activities will render them military objectives:

- (a) engaging in acts of war on behalf of the enemy, e.g., laying mines, minesweeping, laying or monitoring acoustic sensors, engaging in electronic warfare, intercepting or attacking other civil aircraft, or providing targeting information to enemy forces;

- (b) acting as an auxiliary aircraft to an enemy's armed forces, e.g., transporting troops or military cargo, or refueling military aircraft;
- (c) being incorporated into or assisting the enemy's intelligence-gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
- (d) flying under the protection of accompanying enemy warships or military aircraft;
- (e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent aircraft;
- (f) being armed with air-to-air or air-to-surface weapons; or
- (g) otherwise making an effective contribution to military action.⁹⁰

Because attacks on civil airliners are likely to cause injury or death to embarked civilians, they are exempted from attack while in flight, except in situations in which their conduct is clearly hostile.⁹¹

As we have seen, the principle of the military objective, though slow in coming to recognition as articulated in Additional Protocol I and current military manuals, has been imbedded in the law of armed conflict for several centuries. It appeared in numerous nineteenth and twentieth century documents in the form of prohibitions against attacks against certain categories of persons and objects such as undefended towns, churches, hospitals, historic buildings, noncombatant personnel, and combatant personnel who were *hors de combat*. The 1977 Protocol led the way in converting the principle from a list of prohibited targets to a more usable concept for a military commander in appraising whether a particular object or person could be lawfully attacked. Both the old-style negative list of prohibited targets and the new-style permissive principle of defining the military objective have their drawbacks. The former allowed the literal-minded commander to assume that unless a prospective target was on the prohibited list, he could attack it, perhaps

downplaying the related principles of collateral damage, avoiding causing unnecessary suffering, etc. The two-prong test of the latter gives the commander a great deal more discretion and requires the commander to balance the value of the target against the military advantage to be gained from its destruction or capture, obviously importing the relative question of proportionality into the equation. It must be remembered, however, that the old prohibitions have not been excised by the adoption of the new standard of the military object. They remain in effect in the various Hague Conventions of 1907, the Geneva Conventions of 1949, and the treaties for the protection of artistic, scientific, and historic monuments and institutions.⁹² When properly applied, the two-prong test adds an additional layer of protection to those objects and persons who should not and do not constitute legitimate military objectives.

The general acceptance of the principle of the military objective into customary international law, essentially as articulated in Additional Protocol I, marks a step forward in promoting the humanitarian goals represented in the law of armed conflict.

Notes

1. Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, published by the Swiss Federal Political Department, Sept. 26, 1977, at 115-183, *reprinted in* THE LAW OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (Dietrich Schindler and Jiri Toman eds., 3d ed. 1988) [hereinafter Additional Protocol I and Schindler and Toman, respectively].

2. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 321 (1982) [hereinafter BOTHE ET AL.].

3. Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, 28 [hereinafter ICJ Advisory Opinion on Nuclear Weapons], *reprinted in* 35 I.L.M. 809, 827 (1996). According to the Court, the second cardinal principle is that it is prohibited to use weapons causing unnecessary suffering to combatants. *Id.*

4. See Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1, 23 (1992).

5. For a brief summary of these early developments, see ESBJÖRN ROSENBLAD, INTERNATIONAL LAW OF ARMED CONFLICT—SOME ASPECTS OF THE PRINCIPLE OF DISTINCTION AND RELATED PROBLEMS 9, 53 (1977). For a fascinating analysis of the status of the law of war during the medieval and English Renaissance periods and its influence upon the development of the current law of armed conflict, see Meron, *supra* note 4.

6. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (18th century trans., C. Frankel ed., 1947).

7. Francis Lieber, Instructions for the Government of Armies of the United States in the Field, originally published as U.S. War Department, Adjutant General's Office, General Orders No. 100 (Apr. 24, 1863) [Lieber Instructions], *reprinted in* Schindler and Toman, *supra* note 1, at 3.

8. *Id.*, art. 24.

9. *Id.*, art. 22.

10. Declaration Renouncing the Use in Time of War of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868 [St. Petersburg Declaration], *reprinted in* Schindler and Toman, *supra* note 1, at 101.

11. Brussels Conference of 1874, Final Protocol, Aug. 27, 1874, *reprinted in* Schindler and Toman, *supra* note 1, at 25.

12. THE LAWS OF WAR ON LAND (OXFORD MANUAL), adopted by the Institute of International Law at Oxford, 1880, *reprinted in* English in Schindler and Toman, *supra* note 1, at 35.

13. *Id.* at 37.

14. Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Oct. 18, 1907, art. 25, 36 Stat. 2277, [hereinafter Hague IV], *reprinted in* Schindler and Toman, *supra* note 1, at 63.

15. Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, art. 1, 36 Stat. 2351 [hereinafter Hague IX], *reprinted in* Schindler and Toman, *supra* note 1, at 811.

16. Hague IV, *supra* note 14, art. 26; Hague IX, *supra* note 15, art. 6.

17. Hague IV, *supra* note 14, art. 27; Hague IX, *supra* note 15, art. 5.

18. Hague IV, *supra* note 14, arts. 23(g), 28, 46, 47, 52, 53, 55 & 56.

19. HAGUE RULES OF AIR WARFARE, drafted by a Commission of Jurists at The Hague, Dec. 1922-Feb. 1923 [hereinafter HAGUE AIR RULES], *reprinted in* Schindler and Toman, *supra* note 1, at 207.

20. LASSA OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE 519 (Hersch Lauterpacht ed., 7th ed. 1952).

21. In essence, this continued the dichotomy between the so-called "Hague" law (means and methods of war) and the "Geneva" law (protection of victims of war). This dichotomy was obliterated in the Additional Protocols of 1977, which included provisions dealing with means and methods of warfare, as well as those designed to further the protection of victims. This development, among others, has led the International Court of Justice to conclude that, "These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law." ICJ Advisory Opinion on Nuclear Weapons, *supra* note 3, at 27, 35 I.L.M. 827.

22. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949, 587 (1987) [hereinafter ICRC COMMENTARY].

23. *Id.* at 588.

24. *Id.*

25. The Distinction between Military Objectives and Non-Military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction, Resolution adopted by the Institute of International Law at its session at Edinburgh, Sept 9, 1969, *reprinted in* 2 ANNUAIRE L'INSTITUT DE DROIT INTERNATIONAL 375 (1969) (English). In commenting on the results of the Edinburgh Resolutions, the General Counsel of the U.S. Department of

Defense, in a letter concurred in by the Judge Advocates General of the Army, Navy, and Air Force, stated that the requirement that there be an "immediate" military advantage for destruction of an object for it to be classified as a military objective does not reflect "the law of armed conflict that has been adopted in the practice of States." Letter dated Sept. 22, 1972, from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, excerpts from which are quoted in A. Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT'L L. 118, 122 (1973).

26. The Diplomatic Conference was preceded by two sessions of the Conference of Government Experts, which was convened by the ICRC and which held two sessions in 1972 and 1973. Drafts prepared by these conferences, consolidated and harmonized by the ICRC, served as draft texts for the Diplomatic Conference. For background, see ICRC COMMENTARY, *supra* note 22, at xxxi.

27. These include Article 51 (protection of the civilian population), Article 53 (protection of cultural objects and places of worship), Article 54 (protection of objects indispensable to the survival of the civilian population), Article 55 (protection of the natural environment); Article 56 (protection of works and installations containing dangerous forces, such as dams, dikes, and nuclear electrical generating stations), Article 57 (precautions in attack, in particular, measures to avoid collateral damage), and Article 58 (precautions against effects of attacks by the party under attack, such as relocating civilians in the area, etc.)

28. Additional Protocol I, *supra* note 1, arts. 48 & 52. Article 52 contains a third paragraph, which reads as follows: "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used." It has been omitted from the text since it does not form a part of the definition of a military objective, but rather provides a rule of interpretation for the commander ordering or executing an attack.

29. See *supra* note 23.

30. Additional Protocol I, *supra* note 1, art. 49.3.

31. See INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 5 (1995) [hereinafter SAN REMO MANUAL].

32. THE LAWS OF NAVAL WAR GOVERNING THE RELATIONS BETWEEN BELLIGERENTS: MANUAL ADOPTED BY THE INSTITUTE OF INTERNATIONAL LAW (OXFORD MANUAL OF NAVAL WAR), *reprinted* in English in Schindler and Toman, *supra* note 1, at 857.

33. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

34. *Id.*, cmt. b.

35. *Id.*

36. DEPARTMENT OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, HEADQUARTERS, U.S. MARINE CORPS, DEPARTMENT OF TRANSPORTATION, U.S. COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M (Formerly NWP-9), MCWP5-21, COMDTPUB P5800.7, para. 6.1 (1995) [hereinafter COMMANDER'S HANDBOOK].

37. *Id.*

38. W. Michael Reisman and William Leitzau, *Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict*, in THE LAW OF NAVAL OPERATIONS 1 (64 International Law Studies, Horace Robertson ed., 1991).

39. Richard Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 300 (1965-6).

40. See Michael Matheson (Deputy Legal Adviser, U.S. Department of State), *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, in *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM. U. J. INT'L L. & POL'Y 419, 426 (1987) [hereinafter *Sixth Annual Conference*]; Lt Col Burrus M. Carnahan, USAF, *id.* at 508-9. See also Panel Discussion, *Customary Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify*, 81st Annual Meeting of the American Society of International Law, 1987 PROC. A.S.I.L. 27, remarks of M. Matheson at 29-30; B. Carnahan at 37 indicating that Article 51, paragraph 2 which prohibits direct attacks on the civilian population "may well restate current customary law. . . . The definition of military objectives in article 52 has already been incorporated in some military manuals, as well as in treaties other than the protocol; it almost certainly represents customary international law." It should be noted, however, that spokesmen for the U.S. Government have explicitly expressed disagreement with the prohibition of reprisals against the civilian population which is found in Article 51 as well as in Article 52, para. 1. Matheson, *supra* at 426; Remarks of Abraham Sofaer, *in id.* at 469.

41. GA Res. 2444 (XXIII), U.N. GAOR Supp. (No. 18) at 50, U.N. Doc. A/7218 (1969).

42. Letter of Sept. 22, 1972, *supra* note 25. See also THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 68 ff. (1989).

43. See note 39 *supra* and accompanying text.

44. FEDERAL MINISTRY OF DEFENCE OF THE FEDERAL REPUBLIC OF GERMANY, *HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL* (DSK VV207320067), paras. 441-442 (1992) (English translation by German Ministry of Defence; internal citations omitted) [hereinafter *GERMAN MANUAL*].

45. ROYAL AUSTRALIAN AIR FORCE, *OPERATIONS LAW FOR RAAF COMMANDERS*, DI (AF) AAP 1003, paras. 8-4, 8-5 (1st ed., 1994) [hereinafter *RAAF MANUAL*].

46. Director of Law/Training, Office of the Judge Advocate General, Canadian National Defence Headquarters, *CANADIAN FORCES LAW OF ARMED CONFLICT MANUAL* (Second Draft), para. 516 (undated) [hereinafter *CANADIAN DRAFT MANUAL*]. In the introduction, the manual states that it was prepared on the assumption that Canada would ratify the two 1977 Protocols Additional. *Id.* at i.

47. The Army manual currently in effect was adopted in 1956 and thus does not take account of developments in the law of armed conflict since that date. It does, however, incorporate the relevant provisions from the HAGUE RULES which exempt certain categories of persons and objects from attack and contains some general language apparently recognizing as customary international law the general principles of distinction and the military objective. Examples are found in paragraph 25 ("[I]t is a generally recognized rule that civilians must not be made the object of attack directed exclusively against them."); paragraph 56 ("Devastation as an end in itself or as a separate measure of war is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army."). DEPARTMENT OF THE ARMY, *THE LAW OF LAND WARFARE* (FM 27-10), 16, 23 (1956).

It is the author's understanding that the Department of Defense is in the process of preparing a joint service instruction on the law of armed conflict. The Judge Advocate General of the Army is the lead agency in this project. Conversation between the author and Hays Parks, Office of the Judge Advocate General of the Army.

48. DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, AFP 110-31, Nov. 19, 1976, para. 5-3b(1) [hereinafter AIR FORCE PAMPHLET].

49. COMMANDER'S HANDBOOK, *supra* note 36, para. 5.4.2.

50. *Id.* at para. 8.1.1. (emphasis supplied).

51. Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT'L L. 192, 199 (1995).

52. DEPARTMENT OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 9 (Rev. A)/FMFM 1-10, para. 8.1.1., note 9 (1989) [hereinafter ANNOTATED SUPPLEMENT].

53. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M (Formerly NWP 9 (Rev. A)), MCWP 5-21, COMDTPUP P5800.7, para. 8.1.1, note 9 (1997).

54. *Id.*, note 11. These target sets were Leadership Command Facilities; Electricity Production Facilities; Telecommunications and Command, Control, and Communication Nodes (including civil television and radio installations since they could easily be used for C³ backup for military purposes and were used for Iraqi propaganda); Strategic Integrated Air-Defense System; Air Forces and Air Fields; Nuclear, Biological and Chemical Weapons Research, Production, and Storage Facilities; Scud Missile Launchers and Production and Storage Facilities; Naval Forces and Port Facilities; Oil Refining and Distribution Facilities; Railroads and Bridges; Iraqi Army Units; and Military Storage and Production Sites. *Id.*

55. *Id.* para. 8.1.1. The annotation further states that, "Whether this rule permits attacks on war-sustaining cargo carried in neutral bottoms at sea, such as by Iraq on the tankers carrying oil exported by Iran during the Iran-Iraq war, is not firmly settled. Authorization to attack such targets is likely to be reserved to higher authority." *Id.* at note 11. In this respect, Ms. Doswald-Beck states that participants in the San Remo Round Table "indicated that the sinking during the Iran-Iraq War, albeit not as frequent as those during the Second World War, should not be seen as the most significant precedent for an assessment of contemporary law, in view of the extent of violations of international humanitarian law during that conflict generally and the protests that ensued." Doswald-Beck, *supra* note 51, at 200.

56. See, e.g., Hague IV, *supra* note 14, art. 27; Hague IX, *supra* note 15, art. 5.

57. According to a 1940 British study of the Royal Air Force Bomber Command night operations, "two-thirds of all aircrews were missing their targets by over 5 miles." AIR FORCE PAMPHLET, *supra* note 48, para. 5-4d. Even the so-called "precision" daylight bombing by the U.S. Eighth Air Force was precise only in comparison to the night bombing by the British bomber force. According to an Eighth Air Force study, for the September to December 1944 period, only 22 percent of all visually dropped bombs hit within 1,000 feet of their aim point, while only two percent of bombs dropped using blind navigational techniques or radar bombing fell within 1,000 feet of their target. RICHARD HALLION, STORM OVER IRAQ: AIR POWER AND THE GULF WAR 11-12, note 26 (1992), quoting USAAF, AAF Bombing Accuracy Report #2 (Eighth Air Force Operational Research Section, 1945), Chart 2, "Distribution of Effort and Results."

58. Hamilton DeSaussure, conference remarks, in *Sixth Annual Conference*, *supra* note 40, at 512; see also Burrus Carnahan at 516. The United States Air Force manual seems to give some credence to this idea, at least with respect to attacks on civil aircraft, stating, "As a practical matter, the degree of protection afforded to civil aviation and the potential military threat represented, varies directly with the intensity of the conflict." AIR FORCE PAMPHLET, *supra* note 48, para. 4-3b.

59. INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA "EXPLANATION" 116 (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL "EXPLANATION"].

60. BOTHE ET AL., *supra* note 2, at 322. The San Remo Round Table was also initially divided between those members who wished to provide a general definition of military objectives and those who wished to provide a list either of vessels and objects that might be attacked or of those which were exempt. Their eventual solution was to proceed with a general definition, but to supplement it with a limited list of those vessels and aircraft which were exempt from attack, either by virtue of their status (e.g., hospital ships) or their employment (e.g., vessels engaged in missions granted special protection such as cartel vessels). See SAN REMO MANUAL "EXPLANATION," *supra* note 59, at 114-16.

61. "Military objectives" obviously includes combatants, although there is no explicit statement in Additional Protocol I to that effect. As stated by BOTHE ET AL.:

The term "military objectives" is used in different senses in the clauses declaring the two basic principles. In regard to the first clause [of article 48] dealing with the principle of distinction the term "military objectives" is used in contrast to "civilian objects," and "combatants" is used in contrast to "civilians." In the last clause, however, "military objectives" is used as the sole permitted object of the military operations. It would, of course, be manifestly absurd to conclude from this somewhat imprecise drafting that combatants are not a legitimate object of attack. In any event, the context of Arts. 37, 41, 42, 43(2), 51(3) and 52(2) makes it clear that combatants, as well as objects having military value, are included within the term "military objectives" as used in Protocol I.

BOTHE ET AL., *supra* note 2, at 285.

The ICRC COMMENTARY confirms this view, stating that "the definition is limited to objects but it is clear that members of the armed forces are military objectives. . . ." ICRC COMMENTARY, *supra* note 22, at 635.

Two of the military manuals that have been examined have explicitly incorporated "combatants" into their definitions of "military objectives." See, e.g., COMMANDER'S HANDBOOK, *supra* note 36, at para. 8.1.1; CANADIAN DRAFT MANUAL, *supra* note 46, at para. 516.

62. ICRC COMMENTARY, *supra* note 22, at 636.

63. *Id.*

64. BOTHE, ET AL., *supra* note 2, at 324-5 (emphasis in original text).

65. SAN REMO MANUAL "EXPLANATION," *supra* note 59, para. 40.12; L. Doswald-Beck, *supra* note 51, at 199.

66. BOTHE ET AL., *supra* note 2, at 324. In a footnote supporting this statement, BOTHE ET AL. refer, *inter alia*, to the U.S. denial of claims for destruction of British-owned cotton in the Civil War, not on the ground that raw cotton had any value as an implement of war, "but because 'in the circumstances ruling at the time' it was the Confederacy's chief export and thus the ultimate source of all Confederate weapons and military supplies." *Id.* at note 15.

67. SAN REMO MANUAL "EXPLANATION," *supra* note 59, para. 40.12.

68. ANNOTATED SUPPLEMENT, *supra* note 52, para. 8.1.1, note 11, citing 6 Papers Relating to the Treaty of Washington (Report of U.S. Agent) 52-57 (1874).

69. *Id.* The San Remo Round Table also states that

The doctrine of contraband is not applicable to exports from enemy territory. With regard to the latter point, there was a division of views whether measures other than

blockade may be used to block exports that by sale or barter sustain the enemy's war effort. Even though a number of participants supported the view that today the doctrine of contraband may be applied to exports from enemy territory, the Round Table at this stage felt unable to extend the traditional law to that effect. That, however, does not prejudice the authority of the UN Security Council under Chapter VII of the UN Charter.

SAN REMO MANUAL "EXPLANATION," *supra* note 59, at 216.

70. *Id.* at para. 67.27.

71. BOTHE ET AL., *supra* note 2, at 324-5. The authors illustrate their point by describing the Allied attacks on the Pas de Calais area of France prior to the Normandy invasion of 1944. The military advantage was not the reduction of German military strength in that area but rather to deceive the Germans as to where the invasion would take place. *Id.*

72. ICRC COMMENTARY, *supra* note 22, at 637.

73. *Id.*, at 683-5; BOTHE ET AL., *supra* note 2, at 365.

74. See notes 1 and 2 *supra* and accompanying text.

75. See Sect. II above.

76. *Id.*

77. As far as I have been able to determine, the U.S. Navy's 1955 LAW OF NAVAL WARFARE MANUAL (NWIP 10-2), which was the immediate predecessor to the current COMMANDER'S HANDBOOK (NWP 1-14M, previously designated NWP 9), does not mention the term "military objective" nor is the term found in the index of ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA (50 International Law Studies, 1955), which was published contemporaneously and includes the 1955 manual as an appendix.

78. See, e.g., ch. 8, "The Law of Targeting," of the COMMANDER'S HANDBOOK, *supra* note 36; TARGETING ENEMY MERCHANT SHIPPING, (65 International Law Studies, Richard J. Grunawalt ed., 1993); Sally Mallison & William Mallison, *Naval Targeting: Lawful Objects of Attack*, in THE LAW OF NAVAL OPERATIONS, *supra* note 38, ch. IX.

79. Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, 173 L.N.T.S. 353-37 (1936), reprinted in Schindler & Toman, *supra* note 1, at 881-82.

80. For more detailed accounts of the progression of events recounted here, see Mallison & Mallison, *supra* note 78; J. Jacobson, *The Law of Submarine Warfare Today*, in THE LAW OF NAVAL OPERATIONS, *supra* note 78, at 205; L.F.E. Goldie, *Targeting Enemy Merchant Shipping: An Overview of Law and Practice*, in TARGETING ENEMY MERCHANT SHIPPING, *supra* note 78, at 2; Sally Mallison & William Mallison, *The Naval Practices of Belligerents in World War II: Legal Criteria and Development*, in *id.* at 87; Horace B. Robertson, Jr., *U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice*, in *id.* at 338.

81. For assessments of the meaning of the Judgment of the Nuremberg Tribunal in Admiral Doenitz's case with respect to the status of the law governing submarine and air attacks on merchant ships, see D. P. O'Connell, *International Law and Contemporary Naval Operations*, 44 BRIT. Y.B. INT'L L. 52 (1970); Sally Mallison & William Mallison, *Naval Practices*, *supra* note 80, at 87; and Comments on the Mallisons' essay by Mark W. Janis and William J. Fenrick, *id.* at 104 and 110 respectively.

82. SAN REMO MANUAL, *supra* note 31, para. 60.

83. See William J. Fenrick, *The Military Objective and the Principle of Distinction in the Law of Naval Warfare*, in REPORT, COMMENTARIES AND PROCEEDINGS OF THE ROUND-TABLE OF EXPERTS ON INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO ARMED CONFLICTS AT SEA, Ruhr-Universitat Bochum, Nov. 10-14, 1989, 31-37 (Wolff Heintschel von Heinegg ed.,

1991), for a comparison of the rules contained in the Canadian, French, Australian and United States Manuals. The subsequently issued German manual conforms essentially to the same listing. GERMAN MANUAL, *supra* note 44, at para. 1025.

84. SAN REMO MANUAL, *supra* note 31, at para. 67.

85. *Id.*

86. COMMANDER'S HANDBOOK, *supra* note 36, para. 8.2.2.2. See also para. 8.3.1 which contains regard to attacks on enemy merchant ships by submarines.

87. Frits Kalshoven, *Comments on H. B. Robertson's Paper: U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice*, in TARGETING ENEMY MERCHANT SHIPPING, *supra* note 78, at 358, 362.

88. HAGUE AIR RULES, *supra* note 19, at 207.

89. See *id.*, arts. 49-60.

90. SAN REMO MANUAL, *supra* note 31, para. 63.

91. See SAN REMO MANUAL, *supra* note 31, paras. 53 and 56. Compare COMMANDER'S HANDBOOK, *supra* note 36, para. 8.2.3; GERMAN MANUAL, *supra* note 44, para. 1036; CANADIAN DRAFT MANUAL, *supra* note 46, para. 628. For a more extensive discussion of the status of civil aircraft in armed conflict, see Horace B. Robertson, Jr., *The Status of Civil Aircraft in Armed Conflict*, __ ISR. Y.B. INT'L L. __ (1998) (forthcoming).

92. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Apr. 15, 1935, 49 Stat. 3267, *reprinted in* Schindler and Toman, *supra* note 1, at 737; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216, *reprinted in* Schindler and Toman, *supra* note 1, at 745.

XII

Crafting the Rules of Engagement for Haiti

Stephen A. Rose

There was a lot of pressure on the SJA to come up with the right ROE—not only working with the local staff—but in this case, working directly with the Department of Defense. But the real burden that falls on the SJA is advising the commander and providing the means for the commander to translate ROE for that Marine on the ground.

— Lieutenant General Anthony Zinni
Marine Corps Gazette
February 1996

DURING THE COURSE OF A MILITARY CAREER, most of us have at least one occasion to stand at a crossroad of history—to participate directly in shaping an event that might someday be studied in tenth grade history books. My turn came in 1994. The event was Haiti.

By lucky timing, my tour as Staff Judge Advocate (SJA) for the U.S. Atlantic Command (USACOM), which then included the Caribbean in its geographic area of responsibility, began in the spring of 1994—about the same time when serious planning had begun for military intervention in Haiti. Aside from good timing, I was fortunate in two other ways.

First, the USACOM Commander-in-Chief, Admiral Paul Miller, believed in using his legal staff in a proactive mode. As a result, the SJA became a charter member of the inner circle tasked with developing the campaign plan. This early entrée was useful when it became time to craft rules of engagement (ROE) embodying the commander's intent. What could not be foreseen, however, was that the ROE for Haiti would require rapid retooling as the mission shifted from a nonpermissive, forcible entry to a permissive administrative walk-on involving cooperation with Haitian forces. This initial phase of the Haiti campaign proved to be a harbinger of some of the ROE conundrums that were encountered during the later UN withdrawal from Somalia and the problems currently being encountered in Bosnia.

My second slice of good fortune was in having Professor Jack Grunawalt as an ROE mentor—both during my time as a student at the Naval War College, and, since then, on an informal basis for aid when difficult questions of interpretation and precedent arise. He has long been my “pragmatics” teacher, especially adept at blending ROE theory with practical solutions for real-world challenges. His thousands of hours of teaching ROE issues have influenced several generations of operational lawyers involved in military campaigns.

Those who have read this far will recognize that my essay differs in tone and content from other materials in this *liber amicorum*. It is part homage to Jack Grunawalt, part analysis of selected ROE issues, and part reportage of what took place behind the scenery during the initial phase of the Haiti campaign. Several excellent synopses of the Haiti ROE have already been written.¹ My goal is to complement these studies by digging deeper along unmined veins. About 90 percent of the internal DoD deliberations over the final language of the Haiti rules—a dialogue often more spirited than commentators realize—arose from 10 percent of the draft text.

Every ROE package has a handful of clauses that serve as tone-setters and fulcrums for an operation. In essence, ROE become the umbilical cord connecting the National Command Authorities (NCA) to the lowliest Private in harm's way. ROE also serve as a reliable barometer, especially in military operations other than war, for gauging whether political goals and military means are properly synchronized. If Clausewitz were reviewing recent operations in Somalia, Haiti, and Bosnia, he would likely be astonished by the finicky degree to which the U.S. military calibrates its ROE.² What follows are two vignettes illustrating what happened behind the planning curtain when lawyers, operators, and policy makers sought to conjure up optimal ROE for the beginning of the Haiti campaign.

Friend, Foe, or Freelance?

In the spring of 1994, USACOM activated Joint Task Force (JTF) 180, spearheaded by the XVIII Airborne Corps, to develop an operational plan (OPLAN 2370) for *forced entry* into Haiti. It was unclear how much armed opposition could be expected from the military junta then running the country, but the JTF 180 plan relied on surprise and overwhelming force to reduce U.S. casualties³ by minimizing the period of actual engagement. A draft of the ROE annex for this plan was ready by mid-June.

One cornerstone of the proposed ROE was designation of the armed forces of Haiti as “hostile”—i.e., they were subject to attack on recognition without first having to commit a hostile act or demonstrate hostile intent against U.S. forces. The troublesome phrase underlying this concept turned out to be “on recognition.” It was relatively easy to categorize Haiti’s armed forces. They consisted of the Forces Armées D’Haiti (FADH) and its auxiliary, the well-armed National Police, known as the FRAPH. For ROE purposes, all other Haitians were deemed noncombatants.

As the summer of 1994 wore on, however, this distinction between Haitian armed forces and civilians began to blur. By August, U.S. intelligence reports noted that many members of the FADH had begun wearing civilian clothes under their uniforms, and almost all of the FRAPH had discarded their police uniforms in favor of mufti while on duty. Reports also identified the formation of a civilian militia loosely organized by the FADH. This militia had no uniforms or distinctive badges, but was expected to be issued weapons in advance of perceived hostilities and to function as a kind of Haitian *Volkssturm* to defend the country.

In reaction to this development, ROE planners at USACOM began to draft clarifying language to identify “hostile” Haitian forces—now running the gamut from regulars (FADH) to paramilitary (FRAPH) to civil militia—in terms of weaponry rather than apparel. This attempted refinement also proved to be problematic. In mid-August, the U.S. Defense Attaché at Port au Prince estimated that Haitian civilians possessed at least 40,000 firearms.⁴ Given the chronic violence and vigilantism that plagued the country, most Haitians who could afford to do so had armed themselves. The typical family arsenal consisted of machetes, a shotgun or rifle, several handguns, and sometimes automatic weapons and grenades. Another factor fueling the potential for violence was continuing antagonism between the Haitian upper classes, which supported the military junta, and the followers of exiled President

Jean-Bertrand Aristide, who thirsted to settle their grievances with the small clique in economic and political power.

Thus, U.S. planners had to anticipate that the initial stages of a forcible entry might encounter armed elements of the Haitian populace pursuing different goals: some ready to engage American forces; some eager to take advantage of a chaotic situation to carry out acts of political revenge or looting; and some trying to defend families and property. All were likely to be armed, and most would be in civilian attire.

In such a confused environment, choice of ROE serves to allocate risk. *Status*-based ROE, in which pre-declared enemy forces are declared hostile and may be shot on sight, minimize the risk to U.S. troops but may lead to significant civilian casualties if enemy forces are not readily distinguishable from the general populace. Conversely, *conduct*-based ROE, which typically authorize force only in response to hostile acts or intentions, tend to reduce civilian casualties while increasing the risk to U.S. forces. Given the domestic political controversy swirling around the proposed military intervention in Haiti, the United States could ill afford American casualties; but neither could it permit a humanitarian intervention, only reluctantly sanctioned by the United Nations, to result in a bloodbath for Haitians.

In early September, the legal staffs at USACOM and in the Chairman of the Joint Chiefs of Staff's office continued work on ways to bridge the gap between status-based and conduct-based ROE for Haiti. The challenge was to develop a basic engagement criterion that balanced the risk of casualties and had clear meaning for the troops involved. The two legal staffs began at opposite ends of the ROE spectrum but eventually converged to a shared solution.

USACOM continued to press for declaration of Haitian armed forces as hostile (i.e., status-based ROE) but recommended that identification of adversary forces be pegged to weapons rather than to uniforms, badges, or other customary indicia. The operative sentence of our recommendation was couched in terms of a presumption:

You may presume that civilians in public armed with crew-served weapons, automatic weapons, rifles or shotguns are members of the FADH or National Police, and therefore may be treated as hostile.⁵

The Joint Staff favored conduct-based ROE even for the initial hostilities phase and proposed that the final phrase in the USACOM draft be modified to read: "... and therefore should be treated as potentially hostile and dealt with accordingly using all measures short of force if possible."⁶ In essence, this was a self-defense regimen dressed up with some extra adjectives and adverbs to convey a more assertive tone. USACOM continued to press the issue.

The Joint Staff then offered other modifications to stiffen the self-defense language:

... and therefore should be treated as potentially hostile.

A. Where hostile acts or intent are observed, deadly force is authorized.

B. Where no hostile intent or acts are observed, all measures short of deadly force, consistent with mission accomplishment and security of the force, may be employed.⁷

Albeit self-defense with an attitude, on the whole this was still self-defense.⁸ USACOM continued to press.

As a contingency measure, discussion shifted to refining USACOM's proposal for a weapon-based rule. Since it was known that a sizable portion of the Haitian populace lawfully owned and openly carried firearms, it was clearly overreaching to declare all armed civilians encountered in public areas as hostile. At the same time, it was equally clear that persons armed with crew-served or automatic weapons could reasonably be presumed to be members of the Haitian armed forces. The real debate arose over how to treat Haitians armed with shotguns and rifles.

This became known in joint legal circles as the "long-gun" dispute. USACOM's original position had been to include both rifles and shotguns in the adversary identification matrix. The Joint Staff concluded, with some justification, that range rather than length of weapon should be the determining factor. USACOM planners yielded, but fretted that U.S. troops would be hard-pressed to distinguish rifles from shotguns in time to apply hostilities ROE to the former and self-defense ROE to the latter, especially in the uncertain light of the first hours of a pre-dawn assault.

Three days before the scheduled attack date on 19 September, the NCA approved the final ROE package for a nonpermissive entry. The relevant rule is a hybrid of options debated during the preceding fortnight:

You may presume that civilians in public armed with crew-served weapons, automatic weapons, or rifles are members of the FADH, National Police, or paramilitary groups, and therefore may treat them as hostile. Civilians in public armed with shotguns or pistols are presumed to be potentially hostile, but deadly force is not authorized unless such persons use or threaten to use armed force against U.S. troops, U.S. citizens, or designated foreign nationals.⁹

In retrospect, it is probably fortunate that a last-minute agreement with the Haitian leaders eliminated the need to use these ROE.¹⁰ To be effective, such rules need to model real-world activities and choices. Despite weeks of discussion, the judge advocates involved in crafting the ROE for a pre-dawn airborne assault on Haiti were never fully satisfied that they had captured the fractal messiness of what lay ahead. The tradeoffs built into the final package strongly supported mission accomplishment—rapid elimination of armed resistance in Haiti—while fixing a reasonable, if somewhat artificial, breakpoint to distinguish noncombatants. Although OPLAN 2370 belongs to the dustbin of history, the ROE issues that surfaced during its construction were not unique and continue to challenge U.S. planners in current operations.

The Specter of Mission Creep

On 18 September 1994, U.S. forces were primed for a nonpermissive, forced entry into Haiti using hostilities ROE. The following day, pursuant to the Carter Agreement, they entered Haiti permissively under peacetime ROE. Their basic mission was to preserve essential civic order and establish a secure environment for the restoration of Haiti's legitimate government.¹¹

In this effort to maintain public order, U.S. forces had an unlikely partner, their erstwhile adversary of the previous day, the FADH. The Carter Agreement had reserved a significant role for the FADH to continue routine police duties during the transition period. Direct involvement in foreign law enforcement was a task that U.S. military planners were loathe to tackle. Recent experience with "mission creep" in Somalia reinforced the notion that law enforcement responsibilities in a shattered country often become an operational tar baby for military units.

On the eve of the American entry into Haiti, it appeared that U.S. policy makers were comfortable treating "essential civic order" as a macro requirement to prevent widespread chaos and loss of life within the indigenous population rather than as a guarantee of U.S. protection for individual citizens. On 20 September, however, one of the more notorious incidents of the Haiti campaign ended up trumping, at least temporarily, DoD's deep-rooted anxiety about mission creep. Using brute force, Haitian police dispersed a crowd of pro-Aristide demonstrators which had gathered in a festive mood at the edge of a marshalling area for arriving U.S. units. Also on hand were numerous representatives from the media, who videotaped a street vendor being clubbed to death while U.S. troops stood by passively. Newspapers and television networks reported the incident extensively, lambasting policy makers and

military planners for crippling troop effectiveness with inadequate ROE.¹² When new ROE cards appeared the next day, authorizing U.S. forces to intervene to prevent death or serious injury to Haitians, news reports understandably attributed this modification to the media uproar of the day before.¹³

The irony is that this “change” in ROE had already been set into motion on 18 September, before the first soldier set foot in Haiti, and had anticipated the sort of incident that actually happened. Unfortunately, staffing delays held up execution of the policy shift and dissemination of the change in ROE until a day after the fatal beating. In part, this delay was procedural—stemming from the laborious nature of the review process for modifying engagement rules of national importance. In part, the delay was substantive—a by-product of an ongoing debate about the role of the FADH during the interregnum period and the need to disarm Haitian society. To understand how all these variables interacted to create the new ROE card that appeared on 20 September, it is worth a short tour inside the ROE “sausage factory” that existed at the time.

From the beginning, military planners had recognized that the issue of Haitian-on-Haitian crime would be crucial. By June 1994, the ROE cards designed for both the hostilities and post-hostilities phases of the nonpermissive, forcible entry plan, Operation Uphold Democracy (OPLAN 2370 for JTF 180), contained explicit guidance for the troops:

Detain persons suspected of committing a serious criminal act (any act committed after H-hour that would constitute the offense of homicide, aggravated assault, arson, rape, robbery, burglary, or larceny if committed in the United States). Use the minimum force necessary, up to and including deadly force. Use only non-deadly force to detain civilians suspected of committing a serious criminal act that does not pose a serious threat to human life (e.g., larceny).¹⁴

The analogous card for the permissive entry plan, Operation Maintain Democracy (OPLAN 2380 for JTF 190), contained no such guidance, which explains why U.S. forces looked on passively as the Haitian police administered a five-minute fatal beating to the vendor on 20 September. The closest approximation was a rule allowing intervention in a defensive mode.

You may use necessary force to stop, disarm, and detain members of the Haitian military, police, other armed persons, or other persons committing hostile acts or showing hostile intent. Stop and detain other persons who interfere with your mission.¹⁵

In this context, the range of what could be protected was set out in a prefatory note to the soldier card:

Nothing in the ROE limits your right to use necessary force to defend yourself, your fellow servicemembers, your unit, other JTF personnel, key facilities, and property designated by your commander.¹⁶

Armed with these ROE, it would have taken a bold commander to interpret them on D+1 as including protection of Haitian nationals.

So, how did the disconnect arise between OPLAN 2370 and OPLAN 2380? It is misleading to suggest that OPLAN 2370 was more bellicose due to its primary focus as a forced entry plan; the same intervention rule showed up in the 2370 post-hostilities card, which covered a range of civil-military operations equivalent to those being dealt with in OPLAN 2380. Part of the answer lies in the rigorous compartmentalization of OPLAN 2370. Although the two plans were developed in parallel, the JTF 180 team fleshing out OPLAN 2370 could not share ROE with its JTF 190 counterparts preparing OPLAN 2380 until a few days before the execution date.¹⁷ USACOM had visibility over both plans as they developed, but overlooked the ROE difference until about two weeks before the expected D-Day. First realization of the difference in early September did not set off alarm bells within the USACOM staff, since the working expectation at that time was that OPLAN 2370/JTF 180 ROE would control during the first stages of any incursion. Nonetheless, the ROE team at USACOM began to draft a request to the Joint Staff to crosswalk relevant JTF 180 rules into JTF 190.

At this point, approximately 10 September, matters bogged down. USACOM and JTF 190 quickly agreed on the need for authority to intervene in Haitian-on-Haitian violence. Both sides concurred that deadly force was appropriate, if necessary, to prevent death or serious physical injury. CJTF 190 wanted to go a step further, however, and suggested that the original formulation, allowing only non-deadly force to detain Haitians committing property crimes, might be too weak to control looting. After further discussion, a distinction was made between fleeing looters (who could not be engaged with deadly force) and looters who posed a threat to U.S. personnel seeking to detain them (deadly force authorized in self-defense, if necessary). In essence, neither side was eager to push for a rule of engagement permitting thieves to be shot in the back.¹⁸

A similar question arose regarding disarmament. USACOM directed JTF 190 to develop an assertive weapons control program to reduce the potential for street violence. Haitian law generally allowed its citizens to be armed in public,

but JTF 190's approved ROE specified that a soldier "may use necessary force to stop [and] disarm . . . armed persons."¹⁹ On 10 September, the Staff Judge Advocate for JTF 190 sent me a fax seeking clarification on the degree of force that could be used to execute a disarmament policy.

This command [JTF 190] is highly concerned about possible limitations on its ability to disarm the population. Specifically, may deadly force be used, if necessary, when an armed civilian flees during our attempt to disarm?²⁰

This question revisits in another guise the fleeing looter scenario discussed above. By suggesting that continued possession of a weapon might *per se* be a threat to either the security or mission of the force, JTF 190 was seeking a return to status-based ROE for a limited category of individuals. A few days later, the CJTF 190 raised this same issue with the USACOM Deputy CINC, arguing the existence of an ROE-mission mismatch:

For instance, if a small patrol comes around a corner in Port-au-Prince and there is a Haitian ten yards away with a rifle who then runs, the patrol cannot use deadly force to stop him. Thereafter, all Haitians with weapons will run, and the disarmament mission cannot be accomplished.²¹

For several days more, discussion continued over the best way to calibrate the ROE to critical sub-tasks such as disarmament, curfew enforcement, and deterrence of looting, all of which supported the main mission of establishing a secure and stable environment. By D-2, 17 September, USACOM sent the Joint Staff its package of recommended ROE changes to "insure a seamless hand-over between CJTF 180 and CJTF 190."²² The Chairman, serving as interlocutor for the Secretary of Defense,²³ messaged USACOM on D-Day, 19 September, that the changes had been approved as submitted.²⁴ In a nutshell, deadly force was authorized to detain persons observed committing crimes involving death or serious injury; non-deadly force was available to control property crimes, enforce curfews, stop looting, and disarm Haitians.²⁵ Hours later, USACOM signaled approval to JTF 180 and JTF 190 headquarters,²⁶ and dissemination to troops in the field took place during the next 24 hours, but not in time to prevent the beating death on D+1.

On first reflection, this one-day dissemination period may seem to be slow, but the implementation process involved training deployed troops to cope with an expanded set of responsibilities. Explaining whether robbery, which is a crime involving the taking of property from someone by force, authorized a deadly or non-deadly intervention response was one of several adventures that

the JTF 190 legal advisors faced in sorting out the new ROE for their commander and troops.²⁷ This overall episode aptly illustrates the 50 percent rule that can plague ROE development—on controversial issues, each successive review level tends to use up half of the remaining time before D-Day. As a result, most of the available time gets absorbed in policy deliberations, often creating a frantic scramble when it comes time for dissemination to the trigger-puller in the field.

In retrospect, it also seems that the long debate about mission creep led to compromises that were more lawyer-friendly than troop-friendly. As Jack Grunawalt always hammered home in his lectures, ROE should be written for field use, not CNN consumption. Before Haiti, I had always believed that the primary function of ROE was to guide the behavior of the mythical Private Smudlap in the field. I realize now that draft ROE also exert pressure on the other end of the chain of command by forcing senior commanders and the NCA to come to closure regarding their policy for use of force.

The two vignettes described in this essay reflect the tensions that typically arise when crafting ROE for a highly visible, contentious operation. For example, at what point does the push for thoroughness and certainty in the rules end up undercutting an on-scene commander's flexibility to deal with unexpected situations? Conversely, when does too much flexibility become unwelcome ambiguity?²⁸

These tradeoffs are especially challenging in the murky world of peace operations. ROE is both art and science. There can be no universal recipe, since the rules always need to be tailored to a specific context; even so, the basic ROE themes and ingredients transcend geopolitical atmospherics. The lessons learned in Somalia served as a useful head start for those of us working up the Haiti ROE. Similarly, the choices made for Haiti, both successful and unsuccessful, have added to the accumulation of experience available for future planners.

Notes

1. See Army Center for Law and Military Operations, *Law and Military Operations in Haiti, 1994-95: Lessons Learned for Judge Advocates 29-38* (Oct. 3, 1995 draft) [hereinafter CLAMO Study]. See also Office of the Staff Judge Advocate, 10th Mountain Division (Light Infantry), *Operation Uphold Democracy, Multinational Force Haiti After-Action Report, 29 July 1994 to 13 January 1995, at 5-6* (May 1995) [hereinafter 10th Mountain AAR].

2. Karl von Clausewitz's classic precept of war as a continuation of politics by other means was coined in an era when nations treated war as a reasonable and even noble attribute of sovereignty. In one sense, the elaborate attention which the United States gives to formulating detailed rules of engagement for its military forces is the full flowering of Clausewitz's principle.

At the same time, Clausewitz might view our preoccupation with the rule of law as excessive and sympathize with the pungent conclusion of one recent commentator that “[a]ttempts to bring our wonderful, comfortable, painstakingly humane laws and rules to bear on broken countries drunk with blood and anarchy constitute the ass end of imperialism.” Ralph Peters, *After The Revolution*, PARAMETERS, Summer 1995, at 13.

3. For the record, it should be noted that all the intervention plans for Haiti called for a multinational force. Eventually, more than 3,000 personnel from 32 other countries joined the U.S. effort in Haiti. During the crucial period from April-September 1994, however, the military planning and initial execution phase of the intervention were almost exclusively a U.S. project.

4. Message, U.S. Defense Attaché Office, Port au Prince, Haiti, Subj: Weapons Commonly Held by Civilians (161839Z Aug 94).

5. Fax Memorandum from Staff Judge Advocate, U.S. Atlantic Command, to Legal Advisor for Chairman, Joint Chiefs of Staff (Sept. 6, 1994).

6. Fax Memorandum from Legal Advisor for Chairman, Joint Chiefs of Staff to Staff Judge Advocate, U.S. Atlantic Command (Sept. 7, 1994).

7. Notes taken by Staff Judge Advocate, U.S. Atlantic Command, of telephone call from Legal Advisor for Chairman, Joint Chiefs of Staff (Sept. 6, 1994).

8. The phrase “consistent with mission accomplishment and security of the force” is the kind of equivocation that gives commanders a headache. Seen in the best light, such qualifiers provide flexibility to deal with unforeseen contingencies. Seen in the worst light, they seem to be weasel words cueing the commander that his judgment will be questioned if matters go badly—e.g., if there had been substantial U.S. or Haitian casualties.

9. See CLAMO Study, *supra* note 1, at app. G for the text of the JTF 180 ROE card for nonpermissive entry.

10. *Id.* at 11 (discussion of the agreement signed on Sept 19, 1994, by former President Carter and Emile Jonaissant, the military-appointed president of Haiti) [Carter Agreement].

11. See U.S. Atlantic Command, Operation Uphold Democracy: U.S. Forces in Haiti (May 1997) (monograph prepared by USACOM command historian as after-action report of Haiti operations 1994-96), at 16-19.

12. See, e.g., *Haitian Police Attack Crowd: U.S. Troops Watch*, WASH. POST, Sept. 21, 1994, at A1; *Haitian Police Savagely Club Demonstrators; Man Beaten to Death at Port; Disgusted G.I.'s Forced to Watch*, HOUSTON CHRON., Sept. 21, 1994, at A1.

13. See, e.g., *U.S. Troops Cleared for Deadly Force*, HOUSTON CHRON., Sept 22, 1994, at A1; *The G.I.'s and the “Rules of Engagement,”* N.Y. TIMES, Sept. 22, 1994, at A13.

14. Headquarters, Joint Task Force 180, Tab F (draft ROE card for hostilities phase) and Tab G (draft ROE card for civil-military operations) to Appendix 8 to Annex C to JTF 180 OPLAN (June 13, 1994).

15. See CLAMO Study, *supra* note 1, at app. I.

16. *Id.* The entire ROE card was reprinted on 23 Sept. 1994 in THE WASH. TIMES at A20.

17. See 10th Mountain AAR, *supra* note 1, at 5.

18. The one exception to this rule was “mission-essential property” designated by the commander, which could be protected with deadly force. The definition of mission-essential property usually encompassed weapons, explosives, cryptological equipment, classified material, etc.

19. See CLAMO Study, *supra* note 1, at app. I.

20. Fax Memorandum from Staff Judge Advocate, JTF 190 to Staff Judge Advocate, USACOM, at 1 (Sept. 10, 1994).

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21. Fax Memorandum from Commanding General, JTF 190 to Deputy Commander in Chief, USACOM, at 3 (13 Sept. 1994).

22. Message, Commander-in-Chief, USACOM, Subj: ROE Request Serial One (170008Z Sep 94).

23. Technically, the chain of command for approval of national-level ROE runs from a geographic commander-in-chief, such as CINCUSACOM, directly to the Secretary of Defense. In practice, the Chairman of the Joint Chiefs and his staff serve as a coordinating filter for operational matters between the CINCs and the Secretary.

24. Message, Chairman, Joint Chiefs of Staff, Subj: Approval of ROE Request Serial One (190450Z Sep 94).

25. ROE modifications were only one aspect of the larger debate over mission creep. In early September, USACOM developed the following matrix of activities to summarize the level of military involvement in various police functions, during the period before the legitimate government of Haiti was scheduled to return:

Police Activity	Current Haitian Police Involvement	U.S. Military Involvement
(Apolitical)		
Traffic control	Yes	Only to support military mission
Domestic disputes	Yes	No
Minor crime (Shoplifting)	Yes	No
Major property crime (larceny, burglary)	Yes	Only when observed, <i>non-deadly</i> force authorized to detain perpetrator
Personal violence crime (homicide, aggravated assault, arson, robbery)	Yes	Only when observed, <i>deadly</i> force authorized to detain perpetrator
(Civil Disorders)		
Peaceful demonstrations	Yes	No
Violent demonstrations	Yes	Yes, if required for force protection or mission accomplishment
Major civil disorder (riots, looting)	Yes	Yes
(Special Situations)		
Hostage rescue	Yes	Yes, if subject is on protected persons list
Detention	Yes	Yes
Forensic investigations	Yes	No
Prisons/Jails	Yes	No

26. Message, Commander-in-Chief, USACOM, Subj: ROE Change Serial One (190821Z Sep 94).

27. In addition to the obvious training challenge, the physical act of printing and distributing new ROE cards to every service member in the JTF during the first day in a foreign country was, by itself, a feat requiring considerable energy and coordination. See CLAMO Study, *supra* note 1, at 33.

28. ROE have multiple “users”—policy makers, military commanders, troops, and curious onlookers such as the media. Ideally, the troops want clear, simple rules stacked like commandments on a 3"x5" card. Commanders want a well-equipped ROE tool kit inside a flexible framework. Operational lawyers want the ROE package to be a thorough, seamless whole without loose ends or gaps—i.e., a product not requiring intricate glosses. The NCA wants all of the above, plus rules that translate into useful sound bites for the inevitable media grillings.

XII

Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement

Michael N. Schmitt

FREED OF THE STALEMATE that resulted from opposing bipolar superpowers wielding off-setting veto power in the United Nations Security Council, the enforcement regime envisioned by the drafters of the UN Charter in 1945 is slowly becoming a reality.¹ One of the tools that has been fashioned to coercively compel desired norms of international behavior is the no-fly zone.² Its use has challenged traditional notions of sovereignty, while clarifying the operational code regarding those actions which are appropriate responses to threats to the peace, breaches of the peace, or acts of aggression.³

This article will explore how best to craft effective and legal rules of engagement (ROE) for no-fly zones. Rules of engagement are the means governments use to set forth the circumstances in which their military units and personnel are authorized to use force, and, if so, how.⁴ They represent the intersection of policy, law, and operational concerns at the most fundamental level of international relations. This is particularly true for no-fly zone ROE, which govern operations intended to deny a sovereign State the use of its own airspace.

Before exploring this relatively new enforcement mechanism, two brief caveats are in order. First, it is not the purpose here to assess the legitimacy of such zones under international law, either generally or as to specific operations. Doing so would necessitate an in-depth analysis of the UN Charter and customary international law that is well beyond the purview of this article. Rather, the goal is to highlight factors which may contribute to safe, successful, and legal enforcement, assuming, *arguendo*, that a zone is established lawfully. Second, because the rules of engagement for no-fly zones implemented since 1991 remain classified,⁵ the play of ROE in actual operations will be referred to only rarely. Instead, the article articulates broad principles which apply to no-fly zones wherever situated. It is first necessary, however, to set the stage by describing no-fly zones themselves.

No-Fly Zones

A no-fly zone is a *de facto* aerial occupation of sovereign airspace in which, absent consent of the entity authorizing the occupation, only aircraft of the enforcement forces may fly.⁶ Violators may be forced out of the zone or, in extreme cases, shot down. No-fly zones should not be confused with aerial operations designed to enforce economic sanctions against a target State. For instance, following the Iraqi invasion of Kuwait in 1990, the United Nations imposed an embargo on Iraq and Kuwait that eventually encompassed the aerial regime.⁷ Such an action only prohibits transit of aircraft carrying cargo into or out of a designated area. In other words, it delineates boundaries which certain aircraft may not cross; the restriction is linear. By contrast, a no fly-zone restricts flight *within* a designated area. Its coverage is three dimensional.

Enforcement of a no-fly zone presupposes the possible use of force in response to a violation. As the most severe sanction available in international law, the circumstances under which it may be resorted to are highly circumscribed. By a restrictive interpretation of the UN Charter, there are but two.

The first is pursuant to a Chapter VII mandate.⁸ Under Article 39 of that chapter, the Security Council determines whether a "threat to the peace, breach of the peace, or act of aggression" exists.⁹ When it does, the Council may "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable."¹⁰ It need not do so, however, and may proceed directly to the imposition of "measures not involving the use of armed force," such as interruption of aerial "means of communication."¹¹ In the event the Security Council determines that non-forceful measures would be or have

proved inadequate, it may authorize the United Nations, regional organizations, or member States to use force under Article 42 to restore or maintain peace. Specifically cited in the article is “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security . . . [including] . . . demonstrations, blockades, and other operations by air, sea, or land forces of Members of the United Nations.”¹² It is Article 42 that provides the specific legal basis for the use of force in the *mission accomplishment* rules of engagement for no-fly zones.¹³

Should the Security Council decide to authorize military action under Chapter VII, it may do so in one of three ways. First, it may send in “Blue Helmets,” i.e., national forces under UN command and control (C2); certain United Nations Protection Force (UNPROFOR) operations in the former Yugoslavia, for example, were eventually conducted under Chapter VII.¹⁴ Alternatively, it may defer to a regional organization to take the lead in enforcement action. For instance, the NATO-controlled Implementation Force (IFOR) replaced UNPROFOR following execution of the Dayton Peace Agreement in 1995.¹⁵ Finally, the Security Council may authorize member States to take action individually or collectively to implement a particular mandate. The most notable example of this approach was Operation DESERT STORM.¹⁶

The second basis for the use of force is self-defense in response to an armed attack. This authorization is found in Article 51 of the Charter.¹⁷ Albeit visionary, the drafters of the Charter were realists. Understanding that Chapter VII action might not be feasible or likely in all circumstances, they acknowledged the inherent right of States to defend themselves, and other States, until such time as the Security Council acted. Article 51 provides the legal basis for *self-defense* rules of engagement in effect during no-fly operations.¹⁸

A liberal interpretation of the Charter would allow for a third use of force, non-consensual intervention into another State for humanitarian purposes. The legality of humanitarian intervention in international law is an unsettled issue, for it flies in the face of traditional notions of sovereignty and territorial integrity.¹⁹ It is particularly controversial if conducted without the blessing of the Security Council.²⁰ When authorized by the Council on the ground that the internal actions in question constitute a threat to or breach of international peace under Article 39, humanitarian intervention is somewhat less contentious, although not universally accepted.²¹ The no-fly zones over Iraq have been justified in part on this basis.²²

Since 1991, there have been three no-fly zone operations.²³ The first two were the products of the way the Gulf War ended. In the cease-fire talks at Safwan, the Deputy Chief of Staff for Iraq's Ministry of Defense, on being informed that aircraft would not be permitted to fly, queried whether the prohibition extended to helicopters. He argued that due to the conditions of the roads and bridges following the highly effective Coalition air campaign, helicopter flights were necessary for transport of Iraqi officials. General Norman Schwarzkopf agreed to permit the use of helicopters, although he restricted them from flying in areas occupied by Coalition forces.²⁴

Soon after the cease-fire, Kurdish groups in the north and Shi'as in the south revolted.²⁵ A brutal suppression of both uprisings followed, in which helicopters were used extensively.²⁶ The Kurds fled into the harsh mountainous terrain along the Turkish-Iraqi border. Faced with mounting international pressure to come to their assistance, in part the product of a perception that the Kurds and Shi'as had acted in reasonable expectation of Coalition support,²⁷ the Security Council adopted Resolution 688. It labeled the suppression of the Kurds a threat to "international peace and security in the region," insisted that Iraq allow humanitarian relief into the area, and demanded that Iraq cooperate with the Secretary-General to realize these goals.²⁸

Operation PROVIDE COMFORT resulted, and in April 1991 relief flights began dropping supplies to the Kurds as forces of a 13-country coalition entered northern Iraq and established a security zone from which the Iraqis were directed to withdraw.²⁹ In order to provide relief to Kurdish groups under attack and ensure the security of troops on the ground, a no-fly zone was established by the Coalition within Iraq north of the 36th parallel.³⁰ The 36th parallel was an easily understood demarcation that incorporated much of the territory in which the Kurds lived.³¹ Iraqi forces were notified of the zone by *démarche*. Thereafter, any Iraqi aircraft, whether fixed-wing or helicopter, entering the area without prior authorization risked being shot down.

Aircraft of Turkey, France, the United Kingdom, and the United States began flying from Incirlik Air Base in Turkey to enforce the no-fly zone. In August 1996, fighting between the two largest Kurdish groups broke out, with the Iraqi military overtly supporting one faction.³² Since Operation PROVIDE COMFORT had initially been designed in part to protect the Kurds from the Iraqis, the specter of Kurds turning to the Iraqis for assistance caused many to rethink the viability of the operation. Soon thereafter, the humanitarian element of the mission was terminated, the French pulled out, and PROVIDE COMFORT was renamed NORTHERN WATCH.³³

No comparable humanitarian relief effort was mounted in the south. The plight of the Shi'as was less one of starvation or exposure to the elements than it was of brutal suppression. Iraqi helicopter operations against the Shi'as continued until August 1992, when Operation SOUTHERN WATCH was activated to enforce a no-fly zone south of the 32N parallel.³⁴ As in PROVIDE COMFORT, the operation was based on Security Council Resolution 688.³⁵ In response to Iraqi military involvement in the inter-Kurd hostilities, the no-fly zone was extended northward to the 33rd parallel in September 1996.³⁶ Operation SOUTHERN WATCH is conducted by aircraft of the United States, United Kingdom and France operating from bases in Saudi Arabia, Kuwait and the United Arab Emirates.

Interestingly, Resolution 688 neither mentioned Chapter VII nor specifically authorized establishment of no-fly zones. On its face, it authorized no affirmative action. Further, neither NORTHERN nor SOUTHERN WATCH is a classic Chapter VII operation as envisioned in the Charter, i.e., a response to aggression by one State against another. Instead, they more closely resemble humanitarian intervention mounted by multinational forces in response to a threat to international stability.

Despite the difficulty of fitting either operation into a neatly framed Charter-based scheme, legal justification for them has been based on Security Council Resolutions 678, 687, and 688.³⁷ Resolution 678 was the initial grant of authority to use force against Iraq under Chapter VII.³⁸ Subsequently, Resolution 687 set forth the terms of the cease-fire, specifically reaffirming 678 in the process.³⁹ Thus, so the argument goes, the 678 use of force authorization remains intact to effectuate even subsequent resolutions, including 688. This being so, and because 678 authorized member States to act on their own, they were entitled to mount operations to ensure compliance with 688. The results were Operations PROVIDE COMFORT and SOUTHERN WATCH. With the demise of the humanitarian component of PROVIDE COMFORT, NORTHERN WATCH is a bit more difficult to plug directly into this equation because of the absence of direct linkage to the 688 circumstances. Nevertheless, the no-fly zone continues as a *de facto* limit on Saddam Hussein's options against the Kurds. Moreover, his involvement in Kurdish internecine conflict, repeated interference with UN weapons inspectors, alleged involvement in a plot to assassinate George Bush, etc., arguably justify keeping the pressure on him in order to limit the extent of his defiance. Resolution 688, considered in light of the cease-fire resolutions and Iraqi acceptance of their terms, provides a colorable legal basis for doing so in the form of no-fly zones.

Much cleaner from a legal point of view is the no-fly zone that was established over Bosnia-Herzegovina. At the London Conference in September 1992, it was agreed that as a confidence-building measure, and to facilitate the delivery of humanitarian assistance, military flights over Bosnia-Herzegovina would be banned.⁴⁰ Nevertheless, such flights continued. In response, the Security Council adopted Resolution 781 prohibiting them and authorizing UNPROFOR to track compliance through placement of observers at military airfields.⁴¹ In support of the effort, NATO Airborne Early Warning and Control System (AWACS) aircraft began monitoring the zone and passing data it collected to UN authorities.

Violations by the Bosnian Serbs continued. In March 1993 the Security Council upped the stakes with Resolution 816. It authorized member States:

4. . . . (A)cting nationally or through regional organizations or arrangements, to take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures in the airspace of the Republic of Bosnia and Herzegovina, in the event of further violations to ensure compliance with the ban on flights . . . and proportionate to the specific circumstances and the nature of the flights.

It also requested:

5. (T)he Member States concerned, the Secretary-General and UNPROFOR to coordinate closely on the measures they are taking to implement paragraph 4 above, including *the rules of engagement*⁴²

The resolution specifically cited Chapter VII of the Charter as the basis for authorization.

Paragraph 4 is in accordance with Chapter VIII of the UN Charter, which allows the Security Council to seek the assistance of regional organizations in enforcement actions.⁴³ The response came from NATO the following month in the form of Operation DENY FLIGHT. Starting with fifty fighter and reconnaissance aircraft, over time the operation grew to more than 200 operating from bases in Italy and aircraft carriers in the Adriatic.⁴⁴ DENY FLIGHT continued until December 1995, when responsibility for all operations—ground, air, and sea—was transferred to NATO in accordance with the Dayton Peace Agreement.⁴⁵ Thereafter, control of airspace became the responsibility of the IFOR,⁴⁶ a NATO-led force tasked with executing JOINT ENDEAVOR, the peace implementation operation.⁴⁷ In December

1996, IFOR transitioned into the Stabilization Force (SFOR). SFOR continues to conduct aerial operations from bases in Italy.⁴⁸

Thus, of the three no-fly operations, only DENY FLIGHT was explicitly authorized in a Security Council resolution. However, all three look to the UN Charter and the authority it vests in the Council for legitimacy. Since no-fly zones violate traditional notions of near absolute sovereignty over one's own territory, a zone not at least arguably grounded in the Charter regime would be unlikely to survive international scrutiny.⁴⁹ That being so, it is essential to query exactly what the mandate—explicit or implicit—is whenever considering no-fly zones. In the case of DENY FLIGHT, the resolutions authorizing the zone made it quite clear that the prohibitions were limited to military flights, and specifically those in the airspace over the Republic of Bosnia and Herzegovina. Any other use of force (at least vis-à-vis the no-fly zones) not falling within these narrow boundaries would, therefore, be questionable under international law. The sole exception is acts in self-defense pursuant to Article 51 of the Charter. In the cases of the zones over Iraq, far greater interpretive acumen is required, for the mandate is implicit.

Before turning to the rules of engagement, it is important to emphasize that the use of force in no-fly zones is far from an academic question. Violations of the zones have occurred periodically, often drawing a forceful response. In December 1992, an Iraqi MiG-25 fighter south of the 32nd parallel was downed by a SOUTHERN WATCH F-16 Fighting Falcon.⁵⁰ The next month, another F-16 shot down an Iraqi MiG-23 fighter which had crossed the 36th parallel into northern Iraq.⁵¹ Less than a year later, NATO jets downed four Galebs which violated the no-fly zone over Bosnia-Herzegovina.⁵² Enforcement aircraft in all of the no-fly operations have taken ground fire from anti-aircraft artillery (AAA) or surface-to-air missiles (SAM), in many cases necessitating an attack in self-defense on the AAA or missile site in question. More seriously, during DENY FLIGHT, a French Mirage crew was taken prisoner after ejecting and an American F-16 was downed by a SAM.⁵³ The gravity of no-fly zone enforcement is perhaps best illustrated by the horribly tragic incident over northern Iraq on 14 April 1994, in which two U.S. F-15 Eagles mistakenly shot down a pair of U.S. Army Black Hawk helicopters. Twenty-six U.S., UK, French, Turkish, and Kurdish personnel on board perished.⁵⁴

The use of force in each of these incidents was governed by the rules of engagement then in effect. In the aftermath of the Black Hawk shoot-downs, the President of the Aircraft Accident Investigation Board concluded that, in his opinion, Operation PROVIDE COMFORT "personnel did not receive

consistent, comprehensive training to ensure they had a thorough understanding of the USEUCOM-directed ROE. As a result, some aircrews' understanding of how the approved ROE should be applied became over-simplified."⁵⁵ ROE problems were not the sole cause of the tragedy, but they certainly contributed to it. As should be apparent, carefully drafted rules of engagement are essential to ensure compliance with national policy, international law, and sound and safe tactical practices.

Rules of Engagement

Underlying Bases of ROE. Rules of engagement are directives from national authorities which "delineate the circumstances and limitations under which [forces of a country] will initiate and/or continue combat engagement with other forces encountered."⁵⁶ Properly designed, they have three underlying bases that operate in tandem and synergistically—policy, law, and operational concerns.

First, and most fundamentally, ROE are the means by which the National Command Authorities (NCA)⁵⁷ (or comparable authority in other countries) express their intent as to how force will and will not be used to achieve *policy* objectives. They are the realization of Clausewitz's classic maxim that war is "a true political instrument, a continuation of political intercourse, carried on by other means."⁵⁸ Since the NCA cannot be in the cockpit of aircraft monitoring a no-fly zone, ROE allow them to express their intent regarding the use of force to those who are.

The rules of engagement must, therefore, be carefully written so as to preclude actions that might run counter to national policy. The process requires sensitivity to the distinction between *purpose* and *means*. A no-fly zone is nothing more than one means to effectuate a national (or international) purpose, such as mounting a humanitarian relief effort or keeping feuding parties apart.⁵⁹ At times, this subtle, yet critical distinction is lost in the rush to design an impermeable no-fly zone. However, the proper measure for success is not the extent to which violations occur, but rather the congruency of the operation's execution with its underlying political purpose. Those who view it as existing in a political vacuum risk failure by their inability to factor Clausewitzian principles into planning. The Black Hawk shoot-down is apt evidence of the need to be able to live with the political and policy consequences of one's ROE.⁶⁰

The proper focus is on how rules of engagement can shape and bound the use of force to comport with the underlying *purpose* of the mandate. For

instance, if the purpose of a vaguely drafted no-fly zone Security Council resolution is simply to ensure safe delivery of relief supplies or to keep ground attack aircraft from giving in to the temptation to strike enemy forces held in place by a cease-fire, then it is not necessary in the ROE to permit unarmed civil aircraft to be engaged. A civil downing would evoke an international outcry certain to endanger continuance of the operation. By contrast, if the policy goal is to keep intense pressure on a rogue State by denying it the use of its own airspace, then perhaps a comprehensive ban is merited.

Much as rules of engagement are intended to help ensure that use of military force furthers national policy, so too do they ensure that use is lawful.⁶¹ This is the second structural element of ROE—international law. Indeed, in the Department of Defense Dictionary of Defense and Associated Terms, the entries “rules of engagement” and “law of war” are cross-referenced, the only cross-reference in either definition.⁶²

The determinative effect of law is reflective of both the *jus ad bellum*, i.e., that law which governs *when* States may resort to the use of force in their relations, and the *jus in bello*, that law which limits how force may be used once resorted to. As to the former, it has been noted that a no-fly zone is usually a non-consensual aerial occupation of another sovereign State’s airspace by force. Absent consent of the nation in whose airspace the zone is established, ongoing hostilities in an international armed conflict, or some form of Security Council authorization, a no-fly zone would constitute a breach of the enforcing State’s obligation to respect the sovereignty of other States. It would likely be characterized by the international community as a breach of the prohibition on the use of force found in Article 2(4) of the Charter.⁶³ Moreover, even if an implicit or explicit mandate existed, enforcement exceeding the scope of authorization would be unlawful. Thus, intentionally shooting down a civil aircraft in a no-fly zone for military aircraft or enforcing the zone beyond its geographical boundaries would violate international law.

It is also possible that the actual execution of a lawful decision to resort to force to enforce a no-fly zone could violate *jus in bello* prescriptive norms, especially proportionality or necessity. The fact that these two principles are applied in a no-fly zone does not affect their substantive content. An act is militarily necessary or proportionate in a particular context or it is not.

Military necessity is the principle of the law of armed conflict that prohibits destructive or harmful acts that are unnecessary to secure a military advantage.⁶⁴ Before an action can be taken, the actor must be able to articulate the direct military advantage that will ensue therefrom. In other words, destruction may not be wanton or of marginal military value, and military

motivations must underlie it.⁶⁵ Issues of military necessity are rare in no-fly zone enforcement because specific approval is usually required to strike targets other than in self-defense. When authorization is provided, it tends towards selection of traditional military targets directly related to zone enforcement.⁶⁶

Whereas military necessity is a raw assessment of overall military advantage, proportionality expands analysis by balancing the advantage gained against the incidental injury to civilians or collateral damage to civilian objects that results.⁶⁷ It prohibits injury or damage disproportionate to the military advantage secured by the action. To illustrate, if a mobile SAM site is operating from the middle of a village, but poses minimal risk to the operation, or there are clear alternatives to flying through its weapons engagement zone (WEZ),⁶⁸ and attacking it is certain to result in significant casualties among the villagers, it should generally not be hit. The attack would be disproportionate. Similarly, if a no-fly zone intended to foreclose ground attacks is limited to forbidding the presence of military aircraft, it would be disproportionate to destroy a military aircraft with no offensive capability transporting civilians across the zone. Military (actually political advantage sought by the mandate) advantage is outweighed by the incidental injury. The proper remedy in this case is to clarify the requirements; at minimum, parties should be warned that further violations will be dealt with by force.⁶⁹

Both these principles must be factored in as the mandate is translated into rules of engagement. The only exception to their applicability occurs when the mandate itself authorizes acts which would otherwise be unnecessary or disproportionate. After all, the Security Council resolution on which the authority for the zone is based has actual legal valence; the ROE merely interpret the mandate. As an example, the Security Council could authorize an attack on civil aircraft of no military value to the target State or threat to enforcement aircraft (necessity), even if civilian casualties (proportionality) would ensue, simply by implicitly or explicitly including them in its mandate.

To justify this departure from the traditional law of armed conflict, it must be understood that Chapter VII permits what would otherwise be in violation of the law if performed by States acting without Council sanction.⁷⁰ Article 39 allows the Security Council to conduct a balancing test between whatever enforcement actions it deems necessary and the threat to which they respond. Moreover, the Charter, a treaty based in the original consent of the Parties, is generally controlling over existing customary law;⁷¹ as to treaty law, Article 103 provides for the supremacy of Charter obligations.⁷²

It can be argued that in certain extreme cases, such as direct enforcement against civilian objects or personnel, the prohibition on targeting them is more

than customary international law; it has become *jus cogens*, a peremptory norm of international law which admits of no deviation.⁷³ However, the very existence of *jus cogens* norms is controversial.⁷⁴ Any action pursuant to a Chapter VII determination by the Security Council that the measure will contribute to the maintenance of international peace and security would be unlikely to fall as violative of *jus cogens*.

Theory aside, in cases of even questionable uses of force, law quickly fades before policy. A policy decision will have to be made regarding whether or not traditional *jus in bello* prescriptive norms will yield to a weightier policy interest effectuated via Chapter VII. The decision may well turn on a balancing of potential harm to enforcement against likely international condemnation. For obvious reasons, an act violating the traditional *jus in bello* normative paradigm should only be approved in the most extreme circumstances.

From a technical point of view, it must be understood that both necessity and proportionality are principles of the law of armed conflict, a body of law which only applies in international, as distinct from non-international, armed conflict.⁷⁵ No-fly zones may or may not take place in a state of international armed conflict. Fortunately, the difficulty of drawing the complicated legal distinction between international and non-international armed conflict is eased by the policy decision of many States to have their forces apply the law of armed conflict irrespective of the characterization of the conflict absent instructions otherwise.⁷⁶ Therefore, as a matter of policy, if not law, execution of no-fly zone ROE must generally comport with these principles.

The centrality of legal norms in ROE should by now be apparent. Although ROE can never address every possible legal issue that might arise (lest they be so complex as to be rendered completely incomprehensible), effective ROE will cover those most likely to arise in the context of a particular operation, as well as those most difficult to analyze in the split-second decision-making that characterizes aerial operations. It is also important to understand that although the legal aspects of ROE tend to be seen as restrictive, law also allows ROE to act as force *enablers*.⁷⁷ This is most true in the case of self-defense. Recognition that the use of force is always an act of national policy causes some flyers to hesitate to use force, even when reasonable to defend themselves, their troops or other appropriate assets.⁷⁸ An understanding of the international law basis for the ROE can help counter this dangerous propensity.

The third component of effective rules of engagement—complementing policy and law—is operational soundness. ROE may comport with policy and fall within the limits of the law, but if they do not make sense from the perspective of the pilot in the cockpit, they are unacceptable. As an example,

consider a no-fly zone in which there have been multiple incidents of intruder aircraft launching missiles at enforcement aircraft. A rule of engagement that would require a violator to be visually identified (VID) by enforcing aircraft, an act only possible at a distance well within the violator's weapons engagement zone (WEZ), would be foolish at best, possibly suicidal. Combat capable violators must be engaged beyond visual range (BVR) if the zone is to be enforced safely. Of course, fairly complex identification ROE (or guidance on the rules issued by the commander) will need to be developed to guard against mistaken engagements.

This example illustrates the point made earlier that the three bases of ROE operate in tandem and synergistically. The principle of distinction in international law⁷⁹ requires a degree of pre-engagement certainty that helps prevent mistaken downings likely to undermine *policy* objectives. At the same time, and as will be discussed more fully below, the *law* of self-defense allows enforcement aircraft to take whatever actions are tactically prudent to defend themselves and others should a situation not specifically accounted for in the ROE arise. The default right of self-defense permits ROE driven by policy and law to remain *operationally* credible to those who might contest the zone. Credibility gives rise to the deterrent effect the declaration of the no-fly zone was intended to achieve in the first place.⁸⁰

A healthy focus on the bases of ROE will also act to identify defective rules of engagement.⁸¹ Only rules responsive to all three are acceptable. Stated inversely, any rule of engagement that hinders achievement of policy aims, is unlawful or is likely to result in unlawful actions, or is operationally unsound must be rejected. Understandably, then, ROE are best drafted by a team consisting of a judge advocate and an operator,⁸² and must be reviewed at an appropriate policy level.

Mission Accomplishment and Self-Defense Rules. Rules of engagement come in two varieties—mission accomplishment and self-defense. Although it is critically important that this distinction be recognized, the most common mistake made in drafting ROE is the blurring of the two. When this occurs, the likelihood of inadvertently frustrating the mission or placing those who are tasked with its execution at risk tends to be high.

Mission accomplishment rules are the easiest to understand and execute for the operator but present the greatest challenge to those responsible for drafting ROE. As the tether to the specific policy objectives the no-fly zone is intended to achieve, they help ensure that tactics and procedures used by enforcement aircraft are lawful and operationally sound. Mission accomplishment rules also

allow the NCA the opportunity to provide direction on important policy questions regarding the use of force not explicitly addressed in the initial political mandate.

It is here that the actual rules for *enforcing* the zone are set forth. Unlike self-defense rules, mission accomplishment rules are operation specific. They do not apply outside the context of a particular no-fly zone enforcement effort. Reduced to basics, mission accomplishment ROE set forth who may do what to whom, and how, when, and where that action may occur.

Mission accomplishment rules are difficult to develop because of the need to ensure consistency with each of the three bases of ROE. For the sake of illustration, consider a seemingly straightforward Security Council mandate which states that military aircraft are not to fly in a set zone. What does the term “military aircraft” mean? Is it limited to armed aircraft? Does it include military helicopters? Military transport aircraft? Whose military aircraft? What of civil aircraft contracted to carry military supplies and personnel? Are civil aircraft conducting reconnaissance for military purposes considered to be “military aircraft”? What about military aircraft performing civilian functions, such as the transport of officials involved in cease-fire negotiations? Does it matter if military aircraft are transporting civilians because the civil air transport system in the country has collapsed?⁸³ Are military aircraft delivering relief supplies included in the ban? Are military medical aircraft exempt?

The problem is that the political mandate directing enforcement of the zone is likely to be very broadly drafted because of the difficulty of Security Council agreement on minutiae, however important the details may be. The dynamics of consensus-building, particularly in a multi-national environment, drive mandates towards generalities. In some cases, even the no-fly mandate itself must be inferred, as in the case of the Iraqi zones. Mission accomplishment ROE fill in the gaps for those in the cockpit who cannot be expected to resolve policy and legal issues as they receive a radar return from an incoming violator. Therein lies the dilemma. ROE drafters are expected to put policy and legal flesh on a skeleton that was not the product of their own labors and which may be understood differently by the various States involved. In extreme cases, this may result in differing, even conflicting, mission accomplishment ROE during a *combined* operation consisting of multiple national contingents.⁸⁴

Self-defense rules of engagement are much easier to draft, but pose far greater interpretive problems. While ROE governing the use of force to accomplish the mission must be precise enough to safeguard against exceeding the policy mandate, falling short of it, or violating international law, self-defense rules are intentionally drafted broadly in order to pass as much

discretion to the operator as possible. The burden of decision shifts from the drafter to the cockpit; the desire is to avoid any possibility of a crew hesitating to defend itself because the ROE are not directly on point. Therefore, whereas mission accomplishment ROE should anticipate scenarios, self-defense ROE should clarify standards.

For very practical reasons, self-defense ROE are at the heart of no-fly zone enforcement.⁸⁵ Such zones are most likely in the netherworld lying between armed conflict and peace, where it is often unclear who is and who is not friendly. Moreover, they are non-consensual in fact, if not by law. Even when technically consensual, there will be powerful incentives to violate the no-fly zone. If not, there would be little need for enforcement with combat aircraft. What this means is that crews enforcing such zones regularly fly into a highly dangerous environment armed with only a contingent right to use force, i.e., contingent on whether the zone has been violated or whether there is a need to act in self-defense. Effective ROE will allow them to exercise the latter right, which is the foundation of a State's willingness to engage in such operations, to the fullest extent permissible under international law.

There are four types of self-defense, each deriving its legal basis from Article 51 of the Charter.⁸⁶ On the macro level is *national* self-defense, the act of defending one's country and national interests. Generally, national self-defense is accomplished by declaring forces "hostile," i.e., subject to attack *sans plus*. The mere existence of hostile forces renders them targets. National self-defense plays little role in no-fly self-defense ROE.

The second form of self-defense is *individual* self-defense—the act of defending oneself. Complementing individual self-defense is the third type, *unit* self-defense, an action taken to defend other personnel or units of one's own military forces. Finally, political authorities may extend a defensive umbrella to other States or their military personnel. This *collective* self-defense must be approved at the highest level—in the United States, the NCA.⁸⁷ Collective self-defense is an essential element in a *combined* no-fly zone operation during which aircraft of a particular nation typically perform set functions, such as reconnaissance, relying on aircraft from another nation for protection. Article 51 legitimizes this cooperative approach.

It is well established under international law that an act in self-defense must be characterized by two elements—necessity and proportionality.⁸⁸ Beyond that, each State defines the criteria under which its forces may exercise self-defense. The United States takes a relatively liberal view of the right. As used in the self-defense rules of engagement,⁸⁹ necessity and proportionality differ from the *jus in bello* principles of military necessity and proportionality discussed

earlier.⁹⁰ Proportionality and necessity in the context of self-defense ROE are about *when* force may be resorted to. By contrast, in the *jus in bello* context, military necessity and proportionality are basic principles regarding *how* force may be used; they apply to both mission accomplishment and self-defense ROE.

When used as an element of self-defense, necessity is defined as a situation in which a “hostile act occurs or a force or terrorist unit exhibits hostile intent.”⁹¹ “Hostile act” and “hostile intent” are ROE terms of art. The cleanest basis for a use of force in self-defense is in response to a hostile act. It is described as an:

[A]ttack or other use of force by a foreign force or terrorist unit [organization or individual] against the United States, US forces, and in certain circumstances, US citizens, their property, US commercial assets, and other designated non-US forces, foreign nationals and their property. It is also force used directly to preclude or impede the mission and/or duties of US forces, including the recovery of US personnel and vital US Government property. When a hostile act is in progress, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat.⁹²

In the context of a no-fly zone, hostile act means that someone is shooting at you or at someone else involved in the enforcement operation. As a matter of law and policy, the right to defend oneself in the face of a hostile act is universally accepted.

It is with the concept of hostile intent that most difficulties surface. For U.S. forces, hostile intent is:

[T]he threat of imminent use of force by a foreign force or terrorist unit, or organization against the United States and US national interests, US forces, and in certain circumstances, US citizens, their property, US commercial assets, or other designated non-US forces, foreign nationals and their property. When hostile intent is present, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat. A determination that hostile intent exists and requires the use of proportional force in self-defense must be based on convincing evidence that an attack is imminent.⁹³

Simplified, hostile intent means someone is *about to* shoot at you or someone else involved in the enforcement operation. Unfortunately, the policy and legal underpinnings of ROE may seem to conflict with their operational basis when seeking to understand self-defense ROE. Whereas the judge advocate and

policy maker want to insure no action is taken until the requisite threshold for self-defense under Article 51 has been reached, the operator is concerned about one thing—being shot down. These two very different cognitive paradigms can lead to confusion over the meaning of self-defense ROE. The most common misunderstanding turns on the distinction between “threaten” and “threat.” The mere fact that something is a threat to an enforcement aircraft does not mean it has demonstrated hostile intent. It must first threaten the aircraft, i.e., it must engage in an *act* that is hostile or evidence an intent to commit a hostile action. The best way to think of the distinction is as the difference between a verb and a noun; because the standard is one of intent, the actor, even though posing a threat (noun), must act (verb) to suggest his intent in some way.

To illustrate, consider a combat aircraft flying at high speed and altitude towards a no-fly zone line. Armed with long-range air-to-air missiles, this “high-fast flyer” is a potent threat to enforcement aircraft, particularly non-fighters such as tankers. The longer enforcement aircraft wait to engage it, the greater the threat it poses and the more difficult it will be to counter if it crosses the line. Yet, it has done nothing that suggests hostile *intent*; it has threatened no one. Instead, the high-fast flyer has merely flown within its own sovereign airspace, as it is clearly entitled to do under international law. Unless it commits an act that in some way reveals malevolent intent, it may not be engaged until it has crossed the line, a point at which *mission accomplishment* ROE intercede to govern the response. This is a difficult distinction to make for a crew member who must fly in the face of a threat which has not yet threatened.⁹⁴

Even with definitional clarity, hostile intent is difficult to ascertain in practice because it is both subjective and contextual. It is subjective in the sense that unless there is reliable intelligence information regarding the intent of the opposing forces, it is exceedingly difficult to determine intent until a hostile act actually occurs. For instance, if a target State fighter approaching the no-fly zone illuminates an enforcement aircraft with its fire control radar (“locks on”), it may or may not be intending to take a missile shot. Perhaps it only aims to frazzle enforcement aircrews, demonstrate resolve against the operation, or desensitize enforcement aircraft in order to catch them off-guard when it really does intend to shoot.⁹⁵ Or perhaps it is about to launch a deadly air-to-air missile.

Each determination is also contextual. What is a demonstration of hostile intent in certain scenarios may not be in others. Being locked-on in the Gulf of Sidra by a Libyan fighter, for example, is far more likely to constitute hostile

intent than being locked-on in the Hudson Bay by Canadian aircraft. When assessing context, the following factors are often telling:⁹⁶

- *The current political context.* What is the level of tension between the enforcing States and the State over whose territory the zone has been established? Have there been any recent statements or acts indicating the possibility of an attempt to test the resolve of the no-fly forces? Is there any reason to believe now would be an opportune time to do so? For instance, have there been any recent indications of cracks in the coalition enforcing the zone or slippage in international support for it?⁹⁷

- *Prior practice.* Have there been prior violations and/or uses of force against enforcement aircraft? In what circumstances? By ground or airborne assets? What tactics were employed, and do they resemble those the aircrew is observing now?

- *Indications and warning intelligence.* Have there been any deployments of threat systems that might suggest a greater capability or willingness to engage enforcement aircraft? For example, have additional or more capable surface-to-air missile systems or aircraft come into the area? Have SAMs been moved to as yet undetermined locations, thereby raising the possibility of a “SAMbush”?⁹⁸ Has there been an increase in air-to-air training? Has there been an unexplained stand-down (period of little or no flying) that might suggest preparation for an engagement?⁹⁹ Have there been unusual movements of ground forces that indicate a possible military action likely to be accompanied by air support?

- *Capabilities.* Does the aircraft or missile system have the capability to engage at this distance or altitude? With what likelihood of success? How much of a threat is the missile (or other weapon) if the possible hostile intent matures into a hostile attack? In other words, are the enforcement aircraft’s defensive systems, such as electronic-counter measures (ECM) or chaff and flare,¹⁰⁰ effective against this particular threat or can the enforcement aircraft easily maneuver to “defeat” the threat?¹⁰¹

The fact that the determination of hostile intent is subjective and contextual renders it unwise to include a laundry list of acts which amount to hostile intent in the ROE.¹⁰² If an act contained on the list does not rise to the level of hostile intent given the circumstances in which it is occurring, and the aircrew nevertheless reacts forcibly, the response may be characterized as a violation of the prohibition on the use of force in Article 2(4). After all, no act justifying a response under Article 51 has occurred. The action will, at very best, embarrass the enforcement State. More likely, it will result in some form of international condemnation.

On the other hand, a laundry list may cause the aircrew to hesitate to act in valid self-defense should they be faced with a situation not previously contemplated. It is simply impossible to reliably and comprehensibly predict those actions that are indicative of hostile intent. That being so, ROE drafters should not attempt to do so. The far better course is to rely on the pre-mission self-defense training that aircrews receive to enable them to evaluate events as they unfold.

This does not mean that rules of engagement should not include lists of acts that *might* suggest hostile intent. Most do exactly that. For instance, in the no-fly environment, being locked on by a fire control radar or having a potential opponent maneuver into a position from which he can best engage enforcement aircraft are classic examples of potentially hostile intent. The same is true with regard to ground-based SAMs that lock on to enforcement aircraft. However, whenever such lists are included in ROE, it is critically important to stress that they are only *possible* indicators of hostile intent, neither exclusive nor determinative in nature.¹⁰³

Hostile intent is not only difficult to define, it is difficult to place temporally. Recall that the language of Article 51 speaks in terms of an “armed attack.” Yet, surely there is no requirement to take the first hit before the right to self-defense arises.¹⁰⁴ Given today’s effective weaponry, any such assertion would be absurd, for taking the first hit in aerial combat is usually fatal. Most commentators and practitioners agree that there is a right to *anticipatory* self-defense, i.e., the right to act in self-defense before the other side attacks. The question that confounds international law is how anticipatory may the need for self-defense be?¹⁰⁵

The most widely accepted standard is that articulated by Secretary of State Daniel Webster regarding the *Caroline* incident in the nineteenth century. For Webster, self-defense was to “be confined to cases in which the necessity of that self-defense is *instant, overwhelming, and leaving no choice of means, and no moment for deliberation.*”¹⁰⁶ This standard was subsequently referred to approvingly during the Nuremberg trials.¹⁰⁷ Today it is expressed as the requirement of imminency.

But what is it that must be imminent? Imminency cannot possibly be measured in terms of proximity to the actual attack, for such a standard is not responsive to the rationale for the right to self-defense, specifically the right not to have to sit idly by while a fatal blow is delivered. The proper measure of imminency is that point in time when the threatened act can be viably deterred or defeated. In other words, one may not act in self-defense until the moment when failing to do so may be too late. This fine distinction is of critical

importance in aerial operations because of the finality and speed of the hostile act that follows a demonstration of hostile intent.¹⁰⁸

Self-defense not only has a start point, it has an end point as well. Recall the requirement that self-defense be a response to a threatening or hostile act. When that act ends, i.e., when there is no longer an ongoing hostile act or demonstration of hostile intent to respond to, the enforcement aircraft may not persist in engaging in self-defense. This is colloquially known as the “once it’s over, it’s over” rule.¹⁰⁹ It is replete with practical implications for no-fly zone operations. Most significantly, if an aircraft is acting in *self-defense* against another aircraft, and that aircraft clearly and unambiguously breaks off the engagement, then the attacked aircraft has no right under self-defense to continue the fight.¹¹⁰ It too must break off (absent a mission accomplishment rule to the contrary). This may seem contrary to good sense,¹¹¹ which would suggest that the aircraft which committed the hostile act remains a threat by definition. So it, in fact, does; however, recall that self-defense only grants a legal right to respond to *threatening acts*, not *mere threats* (no matter how potent).

What if the action of the enforcement aircraft defeats the threat before it is engaged? For example, assume an enforcement aircraft is illuminated by the fire control radar of a SAM site. This would in many cases constitute a demonstration of hostile intent and permit an immediate attack on the site. However, the threatened aircraft’s most prudent course of action would usually be to maneuver to evade the missile if fired and depart the SAM’s weapons engagement zone. This is so because a quick, immediate response to a SAM site with whatever ordnance happens to be available is a dangerous proposition; SAMs are specifically designed to shoot down aircraft. The alternative, and often better, approach tends to be a measured sequential attack on the site by aircraft carrying anti-radiation missiles, followed by those employing either cluster bomb units or “iron” bombs.¹¹² May the aircraft withdraw and take time to coordinate such an attack?

No it may not, at least not pursuant to the *self-defense* rules of engagement. Once there are no aircraft within the SAM’s weapons engagement zone (WEZ), there is no present threatening act to defend against. This poses a Catch-22 dilemma for no-fly-zone enforcement. An aircraft that is illuminated is at immediate risk and generally should maneuver out of the WEZ as quickly as possible. However, once it does, international law intervenes to deny the aircraft or its fellow aircraft the right to subsequently attack the site in self-defense. The quandary is obvious. The State against whom the no-fly zone is applied could easily frustrate enforcement by simply illuminating

enforcement aircraft, thereby forcing enforcement aircraft into the Hobson's choice of breaking off the overall mission as planned or attacking under less than optimal circumstances.¹¹³

A remedy is to be found in mission accomplishment ROE. By definition, the original mandate called for the enforcement of a no-fly zone, but it is unlikely to include many specific restrictions on this tasking. The zone cannot be enforced effectively if ground-based defenses are permitted to force enforcement aircraft to alter planned missions simply by turning on their radar systems.¹¹⁴ Therefore, the authority to enforce the zone necessarily implies corresponding authority to take whatever reasonable steps are called for to do so safely; this authority would logically include the right to destroy SAM sites that have already demonstrated hostile intentions and are, thereby, frustrating *overall* accomplishment of the mandate. The proper method for articulating the right is through mission-accomplishment ROE, not an overly expansive view of the legal right of self-defense.

Reasonableness is the key. One might argue that it would be even more prudent to take out all SAM sites with an ability to reach enforcement aircraft, regardless of whether or not they had committed a hostile act or demonstrated hostile intent. Absent specific authority in the mandate, doing so as part of the no-fly operation without any incidents of interference with operations would likely be judged to be beyond either the Charter-based use of force authorization of the mandate or the Article 51/customary international law right of self-defense. Reasonableness requires that issuance of the mission accomplishment rule result from evidence that activities at the site(s) have moved it along the continuum from a mere threat towards a target which has acted in a threatening manner. Having just demonstrated hostile intent or committed a hostile act would clearly meet the threshold.

In such cases, the temporal element surfaces again. The longer it has been since the qualifying action, the more difficult it will be to justify an after the fact air strike against the offending site(s) as an appropriate exercise of the mandate. This is particularly so if at some point following the incident, aircraft flying in the area were not threatened; the absence of reaction might indicate that the initial malevolent act was an aberration. Since international law does not permit acts in mere retribution (at least absent specific Chapter VII authorization), a strike may be questioned on legal grounds. Therefore, prudent ROE drafters will limit the extent of the authorization to restrike, recalling the policy component of ROE, to a level at minimum consistent with the relative political fragility of the particular operation. This can be done by setting time standards (e.g., no strike more than X hours after the incident) or

by physical criteria (e.g., strike only with aircraft currently airborne or on strip alert).

Finally, it is vital to remember that hostile intent and hostile acts are merely shorthand for the necessity requirement of self-defense. In fact, necessity is slightly more restrictive than either intent or act, for there are situations in which it is not necessary to engage, even when a hostile act has been committed. Consider an individual firing a pistol out the door of a helicopter at a fighter trailing it out of the zone. In most cases, the weapon poses little threat to the fighter, which can easily lengthen the distance/altitude from which it is trailing the helicopter. Unless the mission accomplishment ROE allow a forceful response based on the act, there is ample time to seek guidance before resorting to force. Remember, the use of force in self-defense has no retributive or deterrent purpose; it merely serves to protect one's self and one's unit. There is no authority to engage under the law of self-defense until friendly forces actually need to be protected.¹¹⁵

The second prong of self-defense is proportionality. Proportionality is defined as the requirement that "the use of force be reasonable in intensity, duration, and magnitude, based on all the facts known to the commander at the time, to decisively counter the hostile act or hostile intent and to ensure the continued safety of U.S. forces."¹¹⁶ Several fine points about this definition merit mention. One is the pervasive question of proportional to what? Many laymen interpret the requirement as "proportional" to the force used against them. By this interpretation, one could not respond to small arms ground fire with bombs or use a missile to down a helicopter that has employed machine guns against an aircraft. This is clearly not the proper reading. The right to use self-defense is designed to protect without unnecessarily escalating the hostilities; it is not a rule designed to ensure a "fair fight" on a level playing field.

Properly understood, proportionality as used in the ROE allows the application of no more force than necessary to counter the hostile act or demonstration of hostile intent.¹¹⁷ Aircrews train to the standard of using the minimum force necessary to get the other side to "knock it off," without taking unnecessary risks themselves. For instance, a missile launch by a single SAM site would not merit a response in self-defense against other SAM sites in a country—at least not in self-defense.¹¹⁸ Similarly, consider a combat search and rescue (CSAR) effort. A column of soldiers moving towards a downed crew member likely harbors hostile intent if the aircraft was shot down by its forces. The troops would reasonably appear to be on their way to capture the crew member. The existence of necessity is clear, for the opposing forces are unlikely

to be deterred except by force (or a demonstration thereof), and the threat is imminent (they are approaching). May the column be attacked and destroyed? Recalling that a no-fly operation is underway rather than open hostilities, the answer is—it depends. If the column can be deterred by warning shots or selective destruction of only a few of the vehicles without forfeiting the ability to destroy it in its entirety, that should be tried. On the other hand, if it is nearly upon the pilot or shooting at him, destruction of the entire column would clearly be an appropriate response.¹¹⁹

What then of the situation where the armament of the enforcement aircraft clearly exceeds the amount of force actually necessary to cause the other side to cease its threatening act? May it be used? Yes, because the law does not deprive an aircraft under attack of the right to defend itself pursuant to Article 51 merely because the mission planners did not fully anticipate the nature of the threat when determining the weapons load. The U.S. ROE account for this very situation by specifically authorizing a response by “*all necessary means available*.”¹²⁰ Consistent with the law of self-defense, then, an enforcement aircraft may use the amount and type of force *currently available to it* that is *reasonably necessary* to deter a demonstration of hostile intent or defend against a hostile act.

As should be clear from the discussion of necessity and proportionality, determining when self-defense is appropriate is no easy task, particularly in the heat of potential battle. Enforcement aircrews can only make subjective educated guesses based on the information at hand. That information must be “convincing,”¹²¹ but the resulting determination need not be correct, it need only be *reasonable*—i.e., would a reasonable airman enforcing this specific no-fly zone in the circumstances then prevailing have believed the information sufficient to conclude an attack was forthcoming?¹²² Constant scenario-based training is the key to achieving reasonableness.¹²³

Before turning from the distinction between mission accomplishment and self-defense ROE, it must be understood that they are independent; neither limits the other. An action authorized in accordance with the mission accomplishment ROE is not disallowed because it fails to meet the criteria for self-defense. Thus, hostile intent and hostile act are generally not relevant when acting pursuant to the mission accomplishment ROE. By the same token, and more importantly, self-defense ROE are never limited by mission accomplishment ROE. If the two should ever come into conflict, self-defense always “trumps” mission accomplishment rules.¹²⁴ This is a core principle of the U.S. approach to rules of engagement, one that is so central that U.S. forces are

not permitted to operate under multinational rules of engagement inconsistent with U.S. notions of self-defense.¹²⁵

This absolute severability of the two genre of ROE has important implications in no-fly zone enforcement. For example, mission accomplishment ROE will usually impose very stringent identification requirements before a zone violator may be engaged. The goal is to preclude mistakes such as those made during the Black Hawks shoot-down incident. However, if the violator commits a hostile act or demonstrates hostile intent in a situation necessitating an immediate response, it may be engaged in self-defense *regardless* of whether or not it has been identified to the level provided for in the mission accomplishment ROE. Similarly, if the mission accomplishment ROE permit, a violator may be engaged even when it has neither committed a hostile act nor demonstrated hostile intent.

The ROE System

ROE systems differ from State to State, with the exception that each country usually issues some form of broad ROE that establish overarching national rules. These are supplemented for specific operations. Whenever serving in a combined operation, the need to understand a coalition partner's ROE system is self-evident, particularly if a set of common ROE cannot be agreed upon. When this occurs, it will be left to the Coalition Commander and the senior officers from each nation contributing forces to develop tactical guidance that accounts for their respective ROE differences in a way that plays to the strengths in each country's rules.

The U.S. system is relatively straight forward. At the pinnacle are the Joint Chiefs of Staff Standing Rules of Engagement (SROE).¹²⁶ Promulgated in 1994, the SROE set forth general rules of engagement which govern the use of force by the U.S. military during both peacetime and armed conflict (absent a specific exemption).¹²⁷ They consist of a Chairman's Instruction, which introduces the rules, and four enclosures: A - Standing Rules of Engagement for U.S. Forces; B - Supplemental Measures; C - Compendium and Combatant Commander's Special ROE; and D - References.

Enclosure A contains the basic rules of engagement that apply in all operations, including those involving no-fly zone enforcement, and at all times. No further authorization is needed for their execution by aircraft enforcing a zone.¹²⁸ The enclosure describes the purpose, scope and policies underlying the rules. More importantly, Enclosure A contains the self-defense rules of engagement. Appendices for Seaborne Forces, Air Operations, and Land

Operations are attached. When issues of self-defense in the no-fly environment arise, it is to Enclosure A that reference should be made.¹²⁹

Supplemental measures, grouped into appendices for general measures, maritime, air, and land operations, are found in Enclosure B. It is essentially a catalogue of draft rules of engagement that decision makers at the appropriate level can turn to in crafting mission accomplishment rules to support a particular operation. For example, possible measures such as the authority to pursue aircraft across designated borders, defend designated non-U.S. assets, or conduct reconnaissance are included. The authorization level for the supplementals varies depending on the nature of the rule sought.

Enclosure C contains a compendium of guidance on the ROE. It also gathers standing rules of engagement issued by the U.S. Combatant Commands to complement the SROE for the area or function the combatant command controls.¹³⁰ In a no-fly zone operation, it is essential to understand both the SROE and the standing ROE of that command which has authority over the operation.¹³¹

Lastly, Enclosure D lists references and contains a glossary of abbreviations, acronyms, terms and definitions. The glossary is particularly useful in achieving common understanding of the rules. For instance, some States do not allow the use of force in the face of hostile intent as a measure in self-defense. Yet, optimally, the threshold to cross prior to using force should be the same for all assigned forces in a combined operation. To achieve this commonality, non-U.S. armed forces that do not apply the intent criterion would have to receive the equivalent of mission accomplishment ROE authorizing a response to hostile intent before they could react as U.S. forces would under the SROE.

Sometimes the difference is more one of form than substance. For instance, U.S. forces usually consider being illuminated by an aircraft's fire control radar to be a demonstration of hostile intent that may require a forceful response. Certain coalition allies, on the other hand, may characterize the illumination as a hostile *act*. In practical terms, the ROE are consistent. The glossary can provide a useful tool for seeking common ground between differing national terminology. Conversely, it can be used to identify substantive variance when the same or similar terms are used.¹³²

As noted, combatant commands issue supplemental measures that are the operation-specific mission accomplishment rules of engagement. Those selected are usually activated in an Operation Order outlining execution of the operation.¹³³ They may also be requested by any subordinate commander (usually a Joint Task Force [JTF] commander) tasked with enforcing the no-fly zone. This option is available throughout the course of the operation. If the JTF commander comes to believe his ROE are flawed or insufficient to successfully execute the

mission, he is obligated to seek whatever authority is necessary to remedy the shortfall. Should Enclosure B not contain a suitable mission accomplishment rule to meet his needs, he may draft and propose one of his own.

The need to revise the ROE during an operation is not uncommon. After all, the original rules were responsive to the political and military environment existing at the time of issuance; however, the environment is in constant flux. For instance, additional SAM systems or ones with greater capabilities may deploy into a previously benign area. If so, it may be prudent to request more robust ROE for air-to-ground strikes in order to ensure the new SAMs do not interfere with the mission. Or consider identification ROE, i.e., the rules regarding how intruders and/or threats are to be identified, and with what surety. If the target State deploys high performance fighter aircraft into an area where there had previously been only helicopters or low performance aircraft, it would be prudent to develop beyond visual range (BVR) identification ROE in lieu of existing ROE requiring visual identification. Alternatively, if enforcement aircraft with a greater capability to identify potential intruders deploy into a JTF's tactical area of responsibility (TAOR), then for legal and policy reasons it may be wise to make the identification ROE more restrictive, at least vis-à-vis missions involving such aircraft.

A shift in the ground situation can also require revision. Consider, the combat search and rescue (CSAR) ROE. If there are friendly forces or friendly indigenous groups in the area, then the rules of engagement for air support to a downed crew member will be much less robust than in a region where anyone approaching the crew member is probably unfriendly. In the former case, a friendly-fire incident is a concern, thereby making it absolutely essential that those approaching be positively identified. In the latter, the primary concern will be safe and prompt recovery of the crewman. If the ground situation changes, then so too should the ROE (or the guidance thereon). Indeed, any change in the environment—political, military, or legal—should occasion a review of the ROE.¹³⁴

When drafting supplemental ROE, combatant commands should not attempt to supplement the SROE self-defense rules. Self-defense is already fully provided for in the SROE to the maximum extent allowed in international law. Along these same lines, use of self-defense terms of art such as “hostile act” or “hostile intent” in the combatant command’s ROE is also ill-advised, for combatant commander ROE are *mission accomplishment* rules. Attempts to expand or explain the right of self-defense in the form of supplemental ROE may inadvertently result in interpretations that are inconsistent with the policy

aims for the operation or complicate the exercise of self-defense by enforcement aircraft.

As a hypothetical example, consider a combatant command rule of engagement that reads, "Illumination of JTF aircraft by fire control radar of a surface-to-air missile site is a demonstration of hostile intent justifying an attack on the emitting site in self-defense." This seemingly clear rule invites confusion for a number of reasons. Those experienced in ROE will know that the combatant command ROE are intended for mission accomplishment. Their immediate question will be whether or not this rule sets a different standard than the SROE self-defense principles, particularly since a basic premise of ROE draftsmanship is to never create lists of hostile intent. The sense that maybe the rule is but a poorly articulated effort to set a *lower* threshold than would normally be the case for self-defense is strengthened by the operational fact that the range or altitude parameters of the fire control radar of some SAM systems significantly exceed their weapons engagement zone.¹³⁵ When this is so, illumination may be an unfriendly act, but it is not a demonstration of hostile intent because no threat can be posed.¹³⁶ By this stream of analysis, the rule is interpreted as a poorly drafted mission accomplishment rule that allows the SAM site to be engaged at a point which might not be justified in self-defense. This is not to say that lowering the threshold would be unreasonable or unlawful. A mission accomplishment rule along these lines is in most no-fly contexts a reasonable attempt to create a safe environment in which to operate. The point is simply that if the intent is not to alter the existing threshold, the rule invites confusion.

The obverse is equally possible. Given inclusion of the terms self-defense and hostile intent, a reasonable conclusion would be that the rule is an attempt to refine the already applicable SROE self-defense rules. But if the actual intent is to lower the threshold, then that intent will have been frustrated. Conversely, if the goal is to clarify self-defense, there is a risk that aircraft will hesitate to defend themselves in the face of what would otherwise be a demonstration of hostile intent until they have been illuminated by a fire control radar. This is the very danger that the drafting prohibition on lists of acts demonstrating hostile intent is directed against.

The possibility of confusion is not far-fetched. Envision a scenario in which multiple enforcement aircraft are in the no-fly zone. Suddenly, there are several radar warning receiver (RWR) indications that they are being painted by fire control radar; one pilot reports seeing a missile on its way up. Meanwhile, another enforcement aircraft receives a RWR indication of *target acquisition* radar associated with a SAM site, but no indication of *fire control* radar.¹³⁷ Standard hostile intent ROE would allow an immediate attack on the

site emitting in the acquisition mode. At least one other ground site has already committed a hostile *act*, and activation of acquisition radar by a second site would reasonably appear to be a continuation of the effort to down an enforcement aircraft. Further, some SAM systems are able to fire their missiles while in target acquisition mode, switching to missile guidance only after the missile has been launched. A rule crafted in terms of fire control radar could delay appropriate actions in self-defense against the second site.

The suggestion that combatant command supplemental ROE is the wrong place to amplify self-defense, and the urging against lists of acts which constitute a demonstration of hostile intent, does not mean to imply that rules of engagement should be set forth in a void of possible scenarios. What it does suggest is that tying them to real-world situations is best left to those tasked with the actual execution of the mission, most often a JTF Commander and his Joint Forces Air Component Commander (JFACC).

It is at this level that the third, and for the aircrew most critical, phase of no-fly ROE development and implementation occurs. Typically, a JTF commander will issue guidance on the application of the ROE to his aircrews.¹³⁸ This guidance should be drafted jointly by the operation's staff judge advocate, who will be attuned to legal concerns and the nuances of precision draftsmanship as well as the JFACC, the officer responsible for operational matters. The guidance will be issued by the JTF commander, the one individual in the organization who best understands the policy mandate he has been given. Thus, all three underlying components of the ROE are accounted for in the guidance.

The commander's guidance is not a formal part of the rules of engagement. Rules of engagement set forth the parameters of *what* it is that enforcement aircraft may do. The commander's guidance on the application of the ROE takes those instructions and sets out *how* the tasks will be accomplished. For instance, the mission accomplishment ROE will state that a particular type of aircraft violating the no-fly zone may be warned to depart, and if it does not, engaged. The guidance, by contrast, outlines the form and content of the warning and the requisite identification criteria before the violating aircraft may be shot down. It authorizes no act not already authorized in either the SROE or the combatant command's supplemental ROE.

Though lengthy by comparison to the ROE, the commander's guidance should inform crew members how they can defend themselves and accomplish the mission, not constitute a legal treatise. Furthermore, the ROE guidance should be based on various situation specific factors: the tasked mission, the threat from ground and air-based systems, capabilities of enforcement assets, and tactical good sense. It must also be subject to a robust legal analysis, not

only for compliance with the legal limits/authorizations found in the ROE, but more generally with international law, especially the law of armed conflict.

Recurring Issues

In any no-fly zone operation, there are three seminal goals: 1) no violations; 2) no mistakes; and 3) no friendly losses. The first is intended to achieve the policy mandate without raising the political stakes by actually having to shoot down an aircraft that dares test the zone. Its success depends on deterrence through credibility, the product of capability and perceived willingness to enforce. Critical to this deterrence is maintaining control over when and in what way enforcement aircraft occupy the zone. In other words, it is important that the target State not be able to drive enforcement aircraft from the zone, thereby opening it to their own.¹³⁹ It is equally important that the engagement decision matrix not be so involved, or the authority to engage so highly set, that enforcement aircraft cannot react in a timely fashion.

The second goal, no mistakes, is intended to maintain the international political cohesion that made possible establishment of the zone in the first place. In that no-fly zones are intrusions on the sovereignty of a State, setting one up is a rather exceptional decision for the international community to make. Continued legitimacy of the zone depends on strict compliance with the limits of the mandate by enforcing States.

Lastly, the operation must be mounted safely, both for the sake of the aircrews involved and to maintain domestic and international support for the operation. This requires a full understanding of what the law of self-defense, and the ROE articulating it in the operational context, allows. None of these goals can be achieved without clarity of purpose and execution. In the remaining section of this article, several of the recurring issues that tend to generate confusion or hesitation during no-fly zone operations will be examined.

Who to Shoot and When? The question of who to shoot is far more complex than might appear at first glance. To the extent the policy mandate does not specify the precise subjects of enforcement, the ROE must do so. Of course, those ROE cannot extend enforcement authority beyond what is a reasonable interpretation of the mandate, for mission accomplishment rules permitting the use of force depend on the mandate involved for legality and legitimacy. Effectively drafted mission accomplishment ROE will, at a minimum, make the following clear for enforcement aircrews.

• *What nationality are the aircraft that enforcement action can be taken against?* Zone prohibitions should be framed with specificity in the ROE. Obviously, aircraft of the target State will be included. However, that State might be allied or cooperating with other States, the aircraft of which may attempt to enter the zone. If so, decision makers should consider extending the zone's prohibitions to include aircraft of such States. Alternatively, a zone may be expressed in terms of a general prohibition, with specific aircraft exempted. For instance, UN aircraft are permitted to fly in the zones over Iraq, and do so often in their weapons monitoring role.¹⁴⁰ Similarly, relief or humanitarian flights by specified countries or organizations may be exempted. Whenever there are either exemptions to a general prohibition or specific prohibitions on aircraft of a certain nationality, rigid identification procedures must be in effect before a possible violator may be engaged.¹⁴¹ As the Black Hawks shoot-down so tragically demonstrated, determining aircraft nationality can be a challenging proposition.

• *Does the prohibition extend to civil aircraft?* There is little doubt that no-fly zones may be enforced against military aircraft.¹⁴² The legality of using force against civil aircraft is a far less settled issue, as the downing of Korean Airlines flight 007 (KAL 007) over the Soviet Union in 1983 demonstrated.¹⁴³ International outrage was expressed loudly and immediately. But for a Soviet veto, the Security Council would have passed a resolution declaring that "such use of force against international aviation is incompatible with the norms governing international behavior and elementary considerations of humanity."¹⁴⁴ The International Civil Aviation Organization (ICAO) approved a resolution containing identical language.¹⁴⁵ Following a fact-finding commission review of the incident, the ICAO Council subsequently reaffirmed that "whatever the circumstances which . . . may have caused the aircraft to stray off its flight plan route, such use of armed force constitutes a violation of international law, and invokes generally recognized legal consequences."¹⁴⁶ Not long thereafter, the ICAO Assembly adopted a proposal for amendment of the Chicago Convention. Article 3 *bis* provides that "the contracting states recognize that every state must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered."¹⁴⁷ Though it has yet to secure the 102 ratifications necessary to come into effect, there is some support for the position that it is in fact declaratory of existing customary law.¹⁴⁸

Despite the crescendo of condemnation following KAL 007, the existence of a Security Council Chapter VII mandate would arguably allow enforcement

against a civil aircraft in a no-fly zone, even if downing it would otherwise violate international law. The Charter is, as discussed earlier, supreme. Nevertheless, it should be obvious that any downing of civilian aircraft would be highly controversial, regardless of its purported legality. Therefore, before drafting ROE vis-à-vis civil aircraft, it must be absolutely clear that the original mandate authorizing the zone was intended to cover them; during post-incident furor over a civil aircraft shoot-down is the wrong time to discover that it does not.

Even if it is clear that such action is authorized by the mandate, the authorization level for actually engaging should remain at a level where the decision maker can factor in the policy and political environment then existing. The fact that one can shoot down a civil aircraft violating a no-fly zone does not mean that one *should*. Downing armed fighters that violate the zone is relatively straightforward from a policy perspective; shooting down civilian aircraft is an entirely different matter. Not only should the approval level be highly placed, but the steps that the enforcement aircraft must perform before it may engage a civil aircraft in mission accomplishment need to be very carefully considered. In particular, the ROE (and commander's guidance on the application of the ROE) must ensure positive identification and impose redundant warning requirements. The warning requirement is particularly important—it acts to shift the onus of responsibility for the shoot-down to the violating aircraft. Additionally, because civil aircraft are being intercepted, tactical guidance for intercept methodology should comply with the procedures set forth by ICAO.¹⁴⁹

Finally, in determining if, when, and how to engage civil aircraft, account should be taken of what it is they are doing. The closer the aircraft is to performing a military function, the less the political risk. It is likely that ROE or ROE guidance based on what the aircraft is doing may prove difficult to execute. Even with a visual (VID) intercept, it may be impossible to determine if it is carrying military or humanitarian relief supplies. Nevertheless, in certain circumstances, ROE based on *act* (e.g., air-dropping supplies) may make sense. Of course, if a civil aircraft commits a hostile act or demonstrates hostile intent *necessitating* a response in self-defense, enforcement aircraft may defend themselves.

- *Does the type of aircraft make a difference?* When the two Black Hawk helicopters were downed over northern Iraq, some criticism was voiced because the helicopters posed no serious threat to the two F-15s. What is forgotten in this assertion is that mission accomplishment ROE were applied in the shoot-down; a threat is not generally a prerequisite in these rules. The

question of whether the F-15s were threatened by the helicopters (if they had actually been Iraqi Hinds)¹⁵⁰ is one of self-defense; in fact, there was never any claim that the F-15s mistakenly acted in self-defense.

The incident highlights the fact that the type of aircraft violating the zone matters when contemplating enforcement action. The more offensively capable the aircraft, the more acceptable the enforcement action, and the less likelihood of negative impact on the policy aims underlying the zone. Understanding this fact is useful in crafting ROE and ROE guidance that is responsive to the policy component of the rules of engagement.

When considering criteria and intercept procedures based on type of aircraft, probably the cleanest distinction that can be made, at least from the perspective of the enforcement aircraft's cockpit, is between fighter/attack aircraft, transport aircraft, and helicopters. Whether the three should be handled differently depends on the context in which the no-fly zone exists. If helicopters have been active in air-to-ground operations, the need to distinguish between engaging fighters and helicopters is minimal. Both are offensively oriented threats to the maintenance of peace. By the same reasoning, if establishment of the zone was primarily in response to the threat to peace posed by ground attack *aircraft*, it may be prudent to set different procedures for responding to helicopters and transports. This certainly is not required as a matter of law so long as the mandate covers all military aircraft, but it is a prudent political step to take. The point is that enforcement procedures and criteria must reflect attendant conditions; type of aircraft is one variable ROE drafters and enforcement operation commanders should consider to ensure this.

If a decision is made to treat varying types of aircraft differently, the differences will lie primarily in identification and warning. Because of the high risk involved in flying close enough to fighter/attack aircraft to visually identify them, it is appropriate to authorize beyond visual range identification and engagement in most circumstances. By contrast, since they pose minimal threat to high performance fighter aircraft, a visual identification of helicopters and transports is ordinarily a reasonable requirement from a tactical perspective. If tactically acceptable, doing so would certainly make sense from a legal or policy perspective.

Differences in the warning requirement take two forms, procedural and substantive. Procedurally, the ICAO intercept procedures are viable in the case of helicopters or transports, but would not be when intercepting a fighter aircraft with air-to-air capability. Substantively, the nature of a particular operation may justify dispensing with the warning requirement altogether for

fighters, or even for helicopters if they have previously been involved in offensive operations. Violating the zone may alone be sufficient justification for engaging them. On the other hand, and again in situation-specific scenarios, it may be politically judicious to warn helicopters or transport aircraft out of the area before acting to shoot them down.

- *Who authorizes engagement of violators?* Whereas the authority to act in self-defense must reside in the cockpit, the decision as to when to engage in a mission accomplishment intercept can be set at whatever level makes sense from a policy and operational perspective.¹⁵¹ Context is controlling. The more politically sensitive a particular type of engagement, the higher the authorization level should be set.¹⁵² For example, if consistent with the operational context, the decision may be made to let the aircrew of the enforcement aircraft determine when to engage a fighter, but require a decision by the JFACC or task force commander to engage anything else. The most sensitive issues surround civil aircraft. It would be unwise to let aircrew act against civil aircraft without higher approval; the political consequences of the act are simply too momentous.

Who to Defend? As noted earlier, U.S. aircraft may always defend themselves or other U.S. military assets. No supplemental rule is required to effectuate this right. This core principle extends to all U.S. military assets, whether assigned to the task force or not. Thus, if Iraqi forces engaged U-2 flights operating in support of the UN weapons monitoring operation (United Nations Special Commission-UNSCOM), as was threatened, U.S. forces of either SOUTHERN or NORTHERN WATCH could act in their defense without any further approval.¹⁵³

Beyond that, a specific supplemental rule must be issued to authorize defense of forces of any other State or organization. In most cases, there will be a supplemental rule authorizing defense of all aircraft participating in monitoring the no-fly zone. Careful review of the scope of the authorization is well-advised. Does it only apply to aircraft assigned to the operation or to aircraft of those States generally?¹⁵⁴ Are there geographical limits placed on the exercise of this collective self-defense?¹⁵⁵ Are there any tactical limits?

As a matter of law, States may not unilaterally extend protection to other States absent their consent.¹⁵⁶ Collective defense ROE should not be approved until such a request has been received; generally, this will occur during the planning phase of the operation. An interesting derivation of this premise involves the extent of self-defense authorized. If the protected State's interpretation of self-defense is narrower than the U.S. interpretation, e.g., by limiting self-defense to hostile acts, may U.S. aircraft nevertheless act based on

their own standard (which includes notions of hostile intent)? The answer is technically “yes,” because intent is an appropriate criterion for self-defense under Article 51 of the UN Charter, which does not distinguish between State, individual, and collective defense. However, they should do so only if the consent of the protected State is express.¹⁵⁷ This position is a logical extension of the *ab initio* need for consent to collective self-defense.

Extension of direct defense to international governmental organizations (e.g., UN), non-governmental organizations (e.g., relief organizations), or any other groups that may be threatened (e.g., the Kurds) also requires specific authorization. As in the case of States, a request for such assistance should precede its execution. This point bears only on the issue of immediately necessary self-defense of such organizations and groups. Beyond that, *mission accomplishment* ROE may be fashioned to implement a national policy providing for their defense.

The question of defense involves not only who to defend, but also against whom. For U.S. forces defending themselves, the SROE rule is clear—anyone. The matter is murkier when defending forces of other States or organizations. A coalition partner may be engaged in entirely separate operations in the target State or have disputes with neighbors unrelated to the no-fly zone enforcement.¹⁵⁸ To come to the defense of its aircraft in other than the no-fly zone enforcement context is to risk creating the impression that the U.S. or its coalition allies have taken sides in an unrelated dispute. When this potential exists, ROE and/or the guidance issued thereon must be carefully drafted to ensure collective defense is engaged in only as it pertains to the no-fly operation itself.

Where Can Enforcement Aircraft Fly . . . and Enforce? There are few principles more established in international law than territorial inviolability. This inviolability extends not only to physical crossings of international borders, but also to the causation of harmful effects in other States.¹⁵⁹ Control over airspace by a State is near absolute within its land borders and territorial sea; it is even more absolute skyward to the point where space begins.¹⁶⁰ The three exceptions to the need for State consent prior to entry into national airspace are flights pursuant to a Chapter VII authorization (e.g., a no-fly zone), necessity in a self-defense situation, *force majeure*, and assistance entry when immediately necessary to save lives. Each applies in the no-fly zone context, and ROE and ROE guidance should reflect the relevant legal principles.

First, because of the principle of territorial inviolability, an ROE supplemental rule must specifically authorize the crossing of international borders. The legal basis for the authority to cross into the target State is obviously the Security Council’s express or implied mandate. Beyond that,

consent would be required to cross any other borders necessary to enforce the zone. If not granted, violators could not be pursued into neighboring States. An oft heard contrary assertion is that they may be chased across international borders when enforcement aircraft are in "hot pursuit."¹⁶¹ The assertion is mistaken, for the term hot pursuit is a legal concept limited to either law enforcement or the proportional protection of territorial sovereignty. Moreover, the pursuit is typically from the enforcement State's territory into international airspace, not into the sovereign airspace of a third State.¹⁶² There being no international legal doctrine of hot pursuit *per se* applicable to a no-fly zone operation, any pursuit that occurs must be based on the authorizing mandate or consent. Where pursuit is generally appropriate is in pursuing a violating aircraft back across a no-fly line *within* the target State. Since the flight is into the target State's airspace, permitting enforcement aircraft to pursue such violators is a reasonable interpretation of the mandate, absent indications otherwise that it was not so intended.

Another argument sometimes heard is that if violating aircraft use neighboring States as sanctuary from enforcement aircraft, and the "host" States fail to act effectively to preclude that practice from continuing, then enforcement aircraft may cross the relevant border to deny violating aircraft *de facto* sanctuary.¹⁶³ This is impermissible without express or implied Security Council authorization. The right to cross borders in self-help derives from application of the law of neutrality and the existence of opposing belligerents.¹⁶⁴ However, no-fly operations usually occur in the absence of classic belligerency between the States enforcing the zone and the target State. Additionally, Security Council approved actions are typically specific as to the identity of the target of the sanctions. The sanctuary State is not yet one. That being so, additional authorization should be sought before crossing borders not encompassed by the original grant of authority.¹⁶⁵

The major exception for no-fly zone enforcement border-crossing authority involves self-defense. There is no geographical limitation to the inherent right of self-defense. Enforcement aircraft defending themselves or others may cross or shoot across any borders in self-defense. For example, if an intruder aircraft illuminates an enforcement aircraft with its fire control radar from across a neighboring border, a response in self-defense may be necessary. The existence of the border should not affect the aircrew's decision to defend. Further, in an actual air-to-air engagement, the existence of all aspect missiles and the ability of high performance aircraft to rapidly turn and engage often make it difficult, if not impossible, to ascertain when an engagement has broken off. As a result, enforcement aircraft may sometimes have to "pursue" intruder aircraft across

borders while the engagement is ongoing. Recalling that this is an act in self-defense, rather than one in mission accomplishment, the pursuit (really the continuation of the engagement) is legal so long as the aircrew's belief that they are still engaged and need to defend themselves is reasonable. Since each of these situations is based on the right to self-defense, no specific supplemental ROE are required.

Force majeure is the principle of international law that a State must allow an aircraft in distress (from weather, mechanical problems, etc.) to enter its airspace and land if no other safe alternative is available to it. Note that the right of military aircraft to claim *force majeure* entry is unsettled.¹⁶⁶ Nevertheless, given the alternative, which may very well be bailing out over the territory of the no-fly zone target State, the logical course of action in most cases is to at least attempt entry on the basis of *force majeure*.

Finally, the right of assistance entry is the right to enter a State's territorial sea or airspace to effect the rescue of a downed crew member at sea.¹⁶⁷ Whether it extends to downed crew members on land is unsettled. Arguably, it is an obligation of the State in whose territory a downed crew member is located to come to the aid of such a person.¹⁶⁸ If that State is not attempting to recover the crew member or refuses to consent to entry of the rescue aircraft from the enforcement forces, and it appears the lives of the crew are at risk due to injuries or the elements, then a colorable claim exists that, under the doctrine of self-help, rescue forces may enter for the very limited purpose of recovering the crew.

Miscellaneous Issues. There are a myriad of context-specific issues that arise during no-fly-zone operations, the resolution of which depends on an extremely close working relationship between judge advocates and operators. Many arise in the air-to-ground arena. The key to effective air-to-ground ROE is to focus on the distinction between the self-defense and mission accomplishment ROE. Mission accomplishment ROE, designed to create a benign environment in which to enforce the zone, should never be mistaken for self-defense ROE, which are intended to ensure an enforcement aircraft an adequate defense against a hostile act or demonstration of hostile intent.

Along these lines, a pervasive issue is the identification criteria for engaging SAM sites in mission accomplishment. It is not unusual for there to be spurious indications on an aircraft's RWR gear of SAM site activity. Therefore, mission accomplishment ROE may require multiple indicators which must be received before a site may be engaged in mission accomplishment. After all, in order for deterrence to work, the entity to be deterred must be able to determine clearly

at which of its acts the response was aimed. However, the criteria in no way affect a crew's response in self-defense. Aircrews need to be sensitive to the likelihood of spurious returns and factor that reality into their determination of whether a hostile act or demonstration of hostile intent has occurred. That said, the decision to engage in self-defense is theirs alone to make, regardless of whether mission accomplishment criteria have been met.

Another common air-to-ground scenario involves combat search and rescue operations. As noted earlier, a crucial question is when may supporting aircraft engage ground forces approaching the downed crew member. As with any self-defense situation, the ROE and commander's guidance should avoid creating checklists of acts demonstrating hostile intent. It may cite sample indicators though, caveating the list with the need to apply them contextually. Relevant factors may include the reason the crew member is down (hostile fire or mechanical problems?), who controls the territory he is in (the target State or indigenous groups friendly to the enforcement operation), and who is approaching him and what their reaction is to measures short of the use of force, such as the presence of enforcement aircraft. The commander's guidance should also set forth who controls the decision that a response in defense of the downed crew is necessary, lest the recovery operation become disjointed. The decision should rest with the on-scene commander, though the commander's guidance must make clear who is serving in that role.¹⁶⁹

In both these examples, basing ROE on sound intelligence and tactics is crucial to success. The determination of whether an act in self-defense is necessary in the face of fire control radar illumination may need to turn on whether the SAM system is mobile or not. If intelligence is generally reliable and an enforcement aircraft receives a RWR indication of a non-mobile SAM site from a location at which there is no known site, that should cause less concern (possibly a spurious hit) than an indication of a mobile SAM that may have been placed there under the cover of darkness. Similarly, recall the discussion of the threat system's WEZ when considering defensive actions. Some might be lulled into complacency when they receive an indication of a SAM that cannot reach their altitude. Yet, good intelligence work may indicate that it is possible to use the radar of that particular system to feed data to another system armed with a missile of greater altitude capabilities. This intelligence data will likely be determinative in assessing whether to engage in self-defense.

In the air-to-air environment, a recurring concern is the degree of certainty necessary before engaging a violator.¹⁷⁰ There is no easy answer to this dilemma. As a general rule, the best approach is to require all reasonably

available systems to attempt to identify a target before it is engaged *if it poses no threat*. Not only would this require visual identification, but it would also necessitate a call by any command and control aircraft working the area (such as an AWACS) that it had no indications the target was anything but a wrongful violator. Additional sources of information that should be considered include intelligence information, the location of the aircraft when it was first noted (e.g., was it in the target State), on-board electronic identification systems that enforcement aircraft possess, non-responsiveness to warnings, and identify friend or foe (IFF) squawks (or the absence thereof).¹⁷¹ The further one moves along the continuum toward aircraft which pose a threat, the more authorization of beyond visual range identification and engagement may be appropriate. Of course, identification criteria should never serve to keep an aircraft from defending itself against what it reasonably believes to constitute a threat under the self-defense rules of engagement.

Rules of engagement, and the commander's guidance on ROE issued to implement them, are tools for integrating policy, legal, and operational concerns and limits during a no-fly zone operation. It is absolutely critical that all three concerns be carefully factored into their development, for the speed with which the aerial picture unfolds is such that ROE for no-fly zones must be very precisely and carefully crafted if the political mandate is to be implemented at minimum risk. As the Black Hawks incident so tragically illustrated, there is no room for error.

Ultimately, two themes must pervade the development of effective ROE for no-fly zone enforcement. First, the distinction between self-defense and mission accomplishment rules has to be clear on the face of the ROE and any guidance thereon. If not, either the mission or the crews who execute it will be placed at risk. Second, the importance of ensuring that operational concerns are addressed in the ROE and guidance is paramount. Effective ROE are the product of a firm grasp not only on the law and the foundational policy objectives of the operation, but also operational reality. Abstract legal or policy discourses only serve to obfuscate the guidance aircrews need to succeed and survive.

Notes

A version of this article is forthcoming at 20 LOYOLA L.A. INT'L & COMP. L.J. ____ (1998).

1. On the effect of bipolarity's demise vis-à-vis the Charter security scheme, and obstacles to the emergence thereof, see Michael N. Schmitt, *The Resort to Force in International Law: Reflections on Positivist and Contextual Approaches*, 37 A.F. L. REV. 105 (1994). See also W.

Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* (Lori F. Damrosch & David J. Scheffer eds., 1991).

2. On no-fly zones generally, see David E. Petersen, *The No-fly Zones in Iraq: Air Occupation* (June 1996) (unpublished manuscript on file at the Naval War College (NWC) library); John N.T. Shanahan, *The Roles of Operational Design and Synchronization in No-fly Zones: Tactical Success, Strategic Failure, and the Missing Link* (June 1996) (unpublished manuscript on file at the NWC library).

3. The operational code is the unofficial, but actual normative system governing international actions. It is discerned in part by observing the behavior of international elites. Operational code is contrasted with the "myth system," the law that, according to such elites, purportedly applies. On the distinction, see W. MICHAEL REISMAN & JAMES BAKER, *REGULATING COVERT ACTION: PRACTICES, CONTEXTS AND POLICIES OF COVERT ACTION ABROAD IN INTERNATIONAL AND AMERICAN LAW* 23-24 (1992); W. MICHAEL REISMAN, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* 23-35 (1987); Schmitt, *Resort to Force*, *supra* note 1, at 112-119.

4. The U.S. Rules of Engagement, described *infra*, are set forth in Chairman, Joint Chiefs of Staff Instruction (CJCSI) 3121.02, *Standing Rules of Engagement for United States Forces* (1994) [hereinafter SROE]. This document is classified SECRET, but all portions cited herein are unclassified. Additional useful discussions of the ROE include Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. REV. 245 (1997) (focusing on the SROE); Bradd C. Hayes, *Naval Rules of Engagement: Management Tools for Crisis*, Rand Note N-2963-CC (July 1989); John G. Humphries, *Operations Law and the Rules of Engagement in Operations Desert Shield and Desert Storm*, AIRPOWER J., Fall 1992, at 25; W. Hays Parks, *Righting the Rules of Engagement*, PROCEEDINGS, May 1989, at 83; Guy R. Phillips, *Rules of Engagement: A Primer*, THE ARMY LAWYER, July 1993, at 4; J. Ashley Roach, *Rules of Engagement*, NAVAL WAR C. REV., Jan.-Feb. 1983, at 51; Stephen P. Randolph, *Rules of Engagement, Policy, and Military Effectiveness: The Tie That Binds* (Apr. 1993) (unpublished manuscript available through DTIC and on file at the NWC and Air War College libraries) (focusing on air ROE during the Vietnam War and ROE in Beirut in 1982-83); Scott E. Smith, *What Factors Affect Rules of Engagement for Military Operations Other Than War* (May 1995) (unpublished manuscript on file at the NWC library); Butch Thompson, *Factors Influencing Rules of Engagement and ROE's Effect on Mission* (Nov. 1995) (unpublished manuscript on file at the NWC library).

5. As of 1 April 1998, Operations NORTHERN WATCH and SOUTHERN WATCH continued. Classification of the ROE is necessary for very practical reasons. A State against which a no-fly zone is imposed would have a much easier time of violating the zone if it knew when enforcement aircraft would employ armed force against intruders, and, more importantly, when they would not. Additionally, ROE set forth tactics for aircraft intercepts and attacks on ground threats that would endanger enforcement aircrews if they were known in advance by the target State forces.

6. Petersen explores the idea of a no-fly zone as an occupation. Petersen, *supra* note 2, generally. It should be noted, however, that the concept of aerial occupation is not a legal one. In traditional humanitarian law, occupation is a term of art for physical control by one belligerent over land territory of another (or of a State occupied against its will, but without resistance). When an occupation occurs, rights and duties arise as between the occupying power and individuals located in the occupied area. An aerial occupation, by contrast, is simply a *de facto*, vice *de jure*, status in which limits are placed on a State's use of its own airspace. Traditional occupation law is found in Geneva Convention Relative to the Protection of Civilian Persons in

Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] and Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1391 [hereinafter Protocol Additional I]. *See also* GERHARD VON GLAHN, *LAW AMONG NATIONS* 811–33 (6th ed., 1992); LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 246–57 (1993); Hans-Peter Gasser, *Protection of the Civilian Population*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT* 209–92 (Dieter Fleck ed., 1995).

7. The initial embargo prohibited the export or import of goods into either Iraq or Kuwait. S.C. Res. 661, U.N. Doc. S/RES/661 (1990), *reprinted in* 29 I.L.M. 1325 (1990). In Resolution 665, the Security Council authorized the use of naval force in the implementation of 661. S.C. Res. 665, U.N. Doc. S/RES/665 (1990), *reprinted in* 29 I.L.M. 1329 (1990). *See also* S/PV/2938. In Resolution 670, the Security Council extended the embargo to the aerial regime.

The Security Council . . . (d)ecides that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before the date of the present resolution, shall deny permission for any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait other than food in humanitarian circumstances, subject to authorization by the Council or the Committee established by resolution 661 (1990) and in accordance with resolution 666 (1990), or supplies intended strictly for medical purposes.

The Resolution also required States to:

(D)eny permission to any aircraft destined to land in Iraq or Kuwait, whatever its State of registration, to overfly its territory unless:

- a) The aircraft lands at an airfield designated by that State outside Iraq or Kuwait in order to permit its inspection to ensure that there is no cargo on board in violation of resolution 661 (1990) or the present resolution, and for this purpose the aircraft may be detained as long as necessary; or
- b) The particular flight has been approved by the Committee established by resolution 661 (1990); or
- c) The flight is certified by the United Nations as solely for the purposes of UNIIMOG.

S.C. Res. 670, U.N. Doc. S/RES/670 (1990), *reprinted in* 29 I.L.M. 1334, 1335 (1990). *See also* S/PV/2943 (1990). On the subject of aerial enforcement operations generally, see Michael N. Schmitt, *Aerial Blockades in Historical, Legal, and Practical Perspective*, 2 USAFA J. LEG. STU. 21 (1991).

8. The UN Charter regime for handling situations endangering international peace and security is set forth in Chapters VI and VII. Chapter VI articulates measures for the peaceful settlement of disputes; the actions provided for therein are entirely consensual. Chapter VII operations using military forces are usually labeled peacekeeping. Though Chapter VII contemplates peaceful steps to resolve a threat/ breach of the peace or act of aggression, it also permits the use of force without the consent of the parties in order to maintain international peace and security. Chapter VIII allows regional organizations (e.g., NATO) to deal with matters regarding international peace and security if so authorized by the Security Council. On peacekeeping, see *BEYOND TRADITIONAL PEACEKEEPING* (Donald Daniel & Bradd Hayes eds., 1995); Myron H. Nordquist, *WHAT COLOR HELMET? REFORMING SECURITY COUNCIL PEACEKEEPING MANDATES* (Newport Paper No. 12, Naval War College) (1997).

9. U.N. CHARTER art. 39.

10. *Id.* art. 40.

11. *Id.* art. 41.

12. *Id.* art. 42.

13. Mission accomplishment rules of engagement are discussed *infra*.

14. The UNPROFOR mandate was originally one of peacekeeping. However, as the situation in the former Yugoslavia deteriorated, Chapter VII sanctions were authorized. *See, e.g.*, S.C. Res. 743 (Feb. 21, 1992), U.N. Doc. S/RES/743 (1992); S.C. Res. 757 (May 30, 1992), U.N. Doc. S/RES/757 (1992); and subsequent UNPROFOR Resolutions, such as that allowing UNPROFOR to defend safe areas [S.C. Res. 836 (June 4, 1993), U.N. Doc. S/RES/836 (1993)].

15. IFOR was authorized under Chapter VII. S.C. Res. 1031 (Dec. 15, 1995), U.N. Doc. S/RES/1031 (1995). The Dayton Peace Agreement is at General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto, U.N. Doc. S/1995/999, annex, 35 I.L.M. 75 (1996); <<http://www.nato.int/ifor/gfa/gfa-home.htm>>. A compilation of material related to the situation in the former Yugoslavia is at <gopher://marvin.stc.nato.int:70/11/yugo>.

16. On Nov. 29, 1990, the Security Council, in Resolution 678, authorized: "Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements . . . the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." S.C. Res. 678, U.N. Doc. S/RES/678 (1990). The term "all necessary means" is the standard phraseology for authorizing armed force.

17. U.N. CHARTER art. 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." Numerous international agreements and pronouncements have reaffirmed this right of self-defense since ratification of the UN Charter. *See, e.g.*, Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (Rio Treaty); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, princ. 1, G.A. Res. 2625, U.N. Doc. A/8028 (1970); North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243; Treaty of Friendship, Cooperation and Mutual Assistance, Oct. 10, 1955, art. 4, 219 U.N.T.S. 3 (Warsaw Pact Treaty).

18. Self-defense rules of engagement are discussed *infra*.

19. On humanitarian intervention, see FERNANDO R. TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (2d ed. 1997). *See also* Richard B. Lillich, *Humanitarian Intervention Through the United Nations: Towards the Development of Criteria*, 53 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 557 (1993). For a short summary of the subject, see Felix Lopez, *The Lawfulness of Humanitarian Intervention*, 2 USAFA J. LEG. STU. 97 (1991).

20. In the *Nicaragua* Case, the International Court of Justice rejected any possible argument for U.S. actions in Nicaragua on the basis of human rights: "In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or enforce such respect. With regard to the steps actually taken, the protection of human rights, a strictly

humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming, and equipping of the Contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States.” *Military and Paramilitary Actions in and Against Nicaragua* (Nicar. v. U.S.) 1986 I.C.J. 13, at para. 268. The *Nicaragua* case, regardless of the merits, is an illustration of why most of the international community disapproves of humanitarian intervention. It is a principle subject to abuse, particularly by States in a position of strength vis-à-vis the State in which the intervention occurs.

21. Article 2(7) of the Charter contemplates this very situation. It provides: “Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; *but this principle shall not prejudice the application of enforcement measures under Chapter VII.*”

U.N. CHARTER art. 2(7) (emphasis added).

22. See discussion *infra*.

23. The operation titles used here—PROVIDE COMFORT, NORTHERN WATCH, and SOUTHERN WATCH—are those of the U.S. component of each of these *combined* (i.e., including forces of more than one country) operations. Other countries may use different names. For instance, the United Kingdom’s forces enforcing the no-fly zone over northern Iraq do so as part of Operation WARDEN. Nevertheless, since the U.S. labels are those generally used to refer to the operations as a whole, that convention is adopted here.

24. RICK ATKINSON, *CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR* 9 (1993). See also MICHAEL R. GORDON AND BERNARD E. TRAINOR, *THE GENERAL’S WAR: THE INSIDE STORY OF THE CONFLICT IN THE GULF* 446 (1995). President Bush had actually made the first cease-fire offer on Feb. 27, 1991. It was immediately accepted by the Iraqis. JOHN N. MOORE, *CRISIS IN THE GULF: ENFORCING THE RULE OF LAW* 254–5 (1992). Talks between Iraqi and Coalition military leaders followed on Mar. 2, 1991. The next day, the Security Council issued Resolution 686 formalizing implementation of the cease-fire at the international level. S.C. Res. 686 (Mar. 2, 1991), U.N. Doc. S/RES/686 (1991), *reprinted in* 30 I.L.M. 567 (1991). In a Mar. 3, 1991, letter from Deputy Prime Minister Tariq Aziz to the President of the Security Council, the Iraqis agreed to accept the terms of 686. U.N. Doc. S/22320 (1991). Approximately one month later, a much more detailed set of demands was passed as Resolution 687. S.C. Res. 687 (Apr. 3, 1991), U.N. Doc. S/RES/687 (1991), *reprinted in* 30 I.L.M. 843 (1991). Its terms were grudgingly accepted by the Iraqis in letters to the Secretary General and President of the Security Council. Letters from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, Apr. 6, 1991, U.N. Doc. S/22456 (1991), *reprinted in* MOORE, *supra*, at 497.

25. See generally HUMAN RIGHTS WATCH, *ENDLESS TORMENT: THE 1991 UPRISING IN IRAQ AND ITS AFTERMATH* (1992).

26. Not only were helicopters used, but in some cases fixed wing aircraft were employed, despite the ban thereon, to suppress the uprisings. See George Bush, Letter to Congressional Leaders Reporting on Iraq’s Compliance with United Nation Security Council Resolutions, WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Sept. 16, 1992, at 1669.

27. For instance, in February 1991 President George Bush seemed to call for the overthrow of Hussein when he stated, “There’s another way for the bloodshed to stop, and that is for the Iraqi military and the Iraqi people to take matters into their own hands and force Saddam Hussein, the dictator, to step down.” Ann Devroy, *Wait and See on Iraq*, WASH. POST, Mar. 29,

1991, at A-15. See also John M. Goshko, *Rebel Urges West to Aid Iraqi Kurds*, WASH. POST, Apr. 2, 1991, at A-15.

28. S.C. Res. 688 (Apr. 15, 1991), U.N. Doc. S/RES/688 (1991).

29. President Bush announced the operation on April 5, 1991. According to Bush, it was “designed to alleviate the plight of the many innocent Iraqis whose lives have been endangered by the brutal and inhumane actions of the Iraqi government.” George Bush, U.S. Humanitarian Assistance to Iraqi Refugees (White House stmt., Apr. 5, 1991), *reprinted in* DISPATCH, Apr. 8, 1991, at 233. On Operation PROVIDE COMFORT, see John P. Cavanaugh, *Operation Provide Comfort: A Model for Future NATO Operations* (May 1992) (unpublished manuscript available through DTIC, and on file at the NWC and Army Command and General Staff College libraries); David E. Clary, *Operation Provide Comfort—A Strategic Analysis* (Apr. 1994) [unpublished manuscript available through DTIC, and on file at the NWC and Air War College libraries]; Donald G. Goff, *Building Coalitions for Humanitarian Operations—OPERATION PROVIDE COMFORT* (Apr. 1992) (unpublished manuscript available through DTIC, and on file at the NWC and Army War College libraries).

30. The use of helicopters against the Kurds was prevalent in the North as well as the South, and President Bush warned the Iraqis against such use in March. Dab Balz, *Bush Criticizes Iraq's Use of Helicopters on Rebels*, WASH. POST, Mar. 15, 1991, at A-37. See also Rick Atkinson, *Iraq Shifts Troops to Combat Kurds*, WASH. POST, Mar. 30, 1991, at A-1, A-12; Johnathan C. Randal, *Kurds' Spring of Hope Collapses Amid Feelings of Betrayal*, WASH. POST, Apr. 3, 1991, at A-1.

31. See Ann Devroy and John M. Goshko, *U.S. Shift on Refugee Enclaves*, WASH. POST, Apr. 10, 1991, at A-1; John E. Yang & Ann Devroy, *U.S. Seeks to Protect Kurd Refugee Areas*, WASH. POST, Apr. 11, 1991, at A-1. Though the zone did have the effect of protecting the Kurds, it was established in part as a security measure for the Coalition forces on the ground in northern Iraq.

32. Operation NORTHERN WATCH Command Briefing (unclassified version) (1997) (on file with author).

33. *Id.* The two Kurdish groups are the Patriotic Union of Kurdistan (PUK) and Kurdish Democratic Party (KDP). The Iraqis sided with the KDP in their 31 August attack on the PUK stronghold of Irbil.

34. See William H. Johnson, *A Piece of the Puzzle: Tactical Airpower in Operations Other Than War* (1994) (unpublished manuscript available at the NWC library), at 12.

35. Although singling out the Kurds, 688 applied generally to all Iraqis. The resolution stated, “The Security Council . . . [g]ravelly concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas . . . which threaten international peace and security. . . .” S.C. Res. 688, *supra* note 28.

36. President William Clinton, Remarks Announcing Missile Strike on Iraq, Sept. 3, 1996, 32 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1641 (1996). The response also included two separate cruise missile attacks designed to suppress air defense facilities (OPERATION DESERT STRIKE I & II). DoD Press Release No. 190-M, <<http://www.milnet.com/milnet/dstrike/dstrike0.htm>>. On Sept. 4, 1996, the President issued a report to Congress in which he stated that the expansion of the southern no-fly zone was a “reasonable response to the enhanced threat posed by Iraq.” PRESIDENT WILLIAM CLINTON, REPORT TO CONGRESS, Sept. 4, 1996.

37. *Id.* In the report, the President stated that the zones “were established pursuant to and in support of United Nations Security Council Resolutions (UNSCR) 678, 687, and 688, which

condemned Iraq's repression of its civilian population, including its Kurdish population, as a threat to international peace and security in the region." *Id.*

38. S.C. Res. 678, *supra* note 16.

39. S.C. Res. 687 & 688, *supra* notes 24 & 28 respectively.

40. Specific Decisions by the London Conference, Doc. LC/C7 (Final), Aug. 27, 1992, *reprinted in* 31 I.L.M. 1539 (1992). Subsequently, on September 15, 1992, measures to implement the decisions were agreed upon by the London Conference Working Group on Confidence and Security-Building and Verification Measures. Report of the Secretary-General on the International Conference on the Former Yugoslavia, paras. 103-109, U.N. Doc. S/24795, Nov. 11, 1992, *reprinted in* 31 I.L.M. 1549, 1574-5 (1992). *See also* U.N. Doc. S/24634, Oct. 8, 1992. Additionally, in a Joint Declaration, the Presidents of Croatia and the Former Republic of Yugoslavia agreed to permit UNPROFOR observers at airfields in their countries as a confidence-building measure. Joint Statement of 19 October 1992 Issued by Federal Republic of Yugoslavia President Cosic and President Izetbegovic of Bosnia and Herzegovina, para. 5, *previously issued in* U.N. Docs. A/47/571 & S/24702 (1992), *reprinted in* 31 I.L.M. 1581, 1582 (1992).

41. S.C. Res. 781 (Oct. 9, 1992), U.N. Doc. S/RES/781 (1992).

42. S.C. Res. 816 (Mar. 31, 1993), paras. 4-5, U.N. Doc. S/RES/816 (1993) (emphasis added).

43. "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council. . . ." U.N. CHARTER art. 53(1). The one exception is for the purposes of collective self-defense pursuant to Article 51.

44. The effort did not prove particularly successful. As one commentator has noted, "[T]he no-fly zone had not even been particularly successful at the *tactical* level. For example, there were over 650 violations of the Bosnia-Herzegovina no-fly zone between April 1993 and January 1994. This is a direct result of a flawed operational design that allowed the Bosnian Serbs to fly helicopters essentially unchallenged despite the helicopter's devastating firepower. The Bosnian Serbs also continued to fly fixed-wing aircraft in strikes of their own against Bosnian and Croat targets even *after* heavy retaliatory U.N. air strikes in September 1995." Shanahan, *supra* note 2, at 15.

45. Dayton Peace Agreement, *supra* note 15, Annex 1A, Agreement on the Military Aspects of the Peace Settlement, Art. I. For a summary of the Dayton Peace Agreement, *see* Dep't of State, Fact Sheet: Summary of the General Framework Agreement, Nov. 30, 1995, <<http://www.nato.int/ifor/gfa/gfa-summ.htm>>.

46. With regard to airspace, the relevant Security Council Resolution provided that under Chapter VII it was authorizing IFOR Member States, "acting under paragraph 14 [of the resolution] above, in accordance with Annex 1-A of the Peace Agreement, to take all necessary measures to ensure compliance with the rules and procedures, to be established by the Commander of IFOR, governing command and control of airspace over Bosnia and Herzegovina with respect to all civilian and military air traffic." S.C. Res. 1031 (Dec. 15, 1995), U.N. Doc. S/RES/1031 (1995).

47. It also included troops from Russia, Egypt, Jordan, Malaysia and Morocco. Partnership for Peace troops were provided by Albania, Austria, Bulgaria, the Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Romania, Sweden, and the Ukraine. Background information on this topic is available in NATO, Basic Fact Sheet No. 4:

NATO's Role in Bringing Peace to the Former Yugoslavia, March 1977, <<http://www.nato.int/docu/facts/bpfy.htm>>.

48. Background information on SFOR is available at NATO, Basic Fact Sheet No. 11, The NATO-led Stabilization Force (SFOR) in Bosnia and Herzegovina, April 1997, <<http://www.nato.int/docu/facts/sfor.htm>>.

49. The zone would be a use of force against the territorial integrity of a member State in violation of UN Charter Article 2(4). Consider the *Corfu Channel* case. British ships were passing through the Corfu Channel in Albanian territorial waters when they were fired upon by Albanian gunners. Several months later, two British warships were struck by mines (made in Germany) within those waters. Therefore, the British sent in their minesweepers to clear the mines, relying on the right of innocent passage. The International Court of Justice found the Albanians liable on the basis that they knew of the mines' presence but did nothing to warn the British warships. It also held the first passage of the warships through the channel lawful under law of the sea principles. However, it found that the minesweeping was not innocent and, therefore, violated Albanian sovereignty. See generally *Corfu Channel (U.K. v. Alb.)* 1949 I.C.J. 4. Interestingly, for separate reasons, it was the UK which was awarded damages.

50. Petersen, *supra* note 2, at 8.

51. Combined Task Force Public Affairs, Operation Provide Comfort Fact Sheet, July 1, 1994 (on file with author). The fact sheet details other instances in which Coalition aircraft were threatened, and in which a forceful response ensued.

52. Fact Sheet No. 4, *supra* note 47. The fact sheet details other uses of force during the operations in the former Yugoslavia. See also Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law (NATO Action in Bosnia)*, 88 AM. J. INT'L L. 515, 522-25 (1994).

53. Shanahan, *supra* note 2, at 15. The capture nearly caused the Dayton Peace Agreement process to breakdown.

54. On the incident, see Aircraft Accident Investigation Board Report, Vol. II, Summary of Facts (unclassified, undated) (copy on file with author).

55. *Id.* at 46

56. JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, Joint Pub 1-02, 329 (1994). See also SROE, *supra* note 4, at GL-15.

57. The National Command Authorities consist of the President and Secretary of Defense or their duly deputized alternates or successors. Joint Pub 1-02, *supra* note 56, at 253, <http://www.dtic.mil/doctrine/jel/old_pubs/jp1_02.pdf>.

58. CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds., 1984). As he so perceptively noted, "the political object is the goal, war is the means of reaching it, and the means can never be considered in isolation from the purpose." *Id.*

59. For example, in the former case, they make execution of the relief mission free from interference by a rogue State's aircraft and helicopters possible; in the latter, they may prevent military actions from the air that could threaten the fragile control over an on-going conflict.

60. Similarly, consider the political consequences had SOUTHERN WATCH aircraft shot down one of the Iraqi military helicopters transporting Haj pilgrims returning from Mecca or engaged Iranian aircraft that penetrated the southern no-fly zone to attack the camps of Iranian opposition groups in Iraq. *Iraqi Copters Cross No-fly Zone*, TORONTO STAR, Apr. 23, 1997, at A-19; *Baghdad Says Iran Bombed Exiles in Iraq*, N. Y. TIMES, Sept. 30, 1997, at A-1.

61. Military lawyers (judge advocates) have long played an integral role in the development of ROE. See, e.g., Dep't of Defense Directive 5100.77, DoD Law of War Program (July 10, 1979) (requires the Chairman of the Joint Chiefs of Staff and Unified and Specified Command

Commanders to ensure ROE comply with the law of armed conflict); JCS Memorandum MJCS 0124-88, Implementation of DoD Law of War Program (Aug. 4, 1988) (on file with author) (legal advisers are to review ROE for compliance with the DoD Law of War Program). The requirement for legal involvement in armed conflict is long-standing. See, e.g., Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 1, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV] (signatories are to issue instructions to their forces on the Convention's annex); Geneva Convention IV, *supra* note 6, art. 144 (Parties "undertake . . . to disseminate the text of the present Convention as widely as possible in their respective countries, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction. . . ."); Protocol Additional I, *supra* note 6, art. 82 (" . . . Parties . . . shall ensure that legal advisers are available when necessary, to advise military commanders at the appropriate level on the application of the convention and this Protocol and on the appropriate instruction to be given to the armed forces in this subject."). On the requirement for and role of legal advisers, see LESLIE C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 73–82 (1985).

62. Joint Pub 1-02, *supra* note 56, at 329 & 215 respectively.

63. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2(4).

64. The Charter of the International Military Tribunal at Nuremberg specifically characterized "the wanton destruction of cities, towns or villages or devastation not justified by military necessity" as a war crime. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b), 59 Stat. 1544, 82 U.N.T.S. 279. The offense was further clarified in *The Hostage Case*:

[Military necessity] does not permit the killing of innocent inhabitants for the purpose of revenge or the satisfaction of a lust to kill. The destruction of property to be unlawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.

The Hostage Case (U.S. v. List), 11 T.M.W.C. 759, 1253-54 (1950). Codification of the principle is in Article 23(g) of Hague IV, which prohibits acts that "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Hague IV, Annex, Regulations Respecting the Laws and Customs of War on Land, *supra* note 61, art. 23(g). Though there is occasionally some discussion as to whether the article protects all property or only State property, both the U.S. Army and the International Committee of the Red Cross opine that it covers any property, wherever situated and however owned. See 2 DEPARTMENT OF THE ARMY, INTERNATIONAL LAW (Pamphlet No. 27-161-2) 174 (1962); INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 301 (Jean S. Pictet ed., 1958).

65. During an international armed conflict, the issue usually arises in the context of a target that would be protected as a civilian object, but which in some way now contributes to the military effort. Since the law wishes to protect civilians and civilian objects, it imposes a requirement of directly contributing to an enemy's war effort before it will dispense with that protection.

66. E.g., air defense related facilities as in the case of DESERT STRIKE I & II in 1996. Transcripts of DoD Press Briefings on Desert Strike are collected at <<http://www.defenselink.mil/iraq/brief.html>>. Examples of necessity questions are, nevertheless, imaginable. For instance, it would violate the principle of military necessity to destroy an electrical generation station serving a city from which a shoulder-launched SAM had been launched simply to convince the other side not to launch additional missiles. In the no-fly context, the relationship between that act and the goal of precluding the SAM sites from engaging enforcement aircraft is too attenuated.

67. Though the United States is not a Party to the agreement, Additional Protocol I contains two proportionality provisions, both of which the U.S. characterizes as declaratory of customary international law. Article 51(5) provides that “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” is disallowed as indiscriminate. Article 57(2)(b) requires an attack to be canceled or suspended if “it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Additional Protocol I, *supra* note 6, arts. 51(5) & 57(2)(b) respectively. For a summary of Protocol I and the U.S. position on key articles, see INTERNATIONAL AND OPERATIONS LAW DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPT OF THE AIR FORCE, OPERATIONS LAW DEPLOYMENT DESKBOOK, tab 12 (n.d.). An unofficial article often cited as accurately setting forth the U.S. position is Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419 (1987).

68. The area (measured in range and altitude) in which targets can be effectively engaged and destroyed.

69. The advantage calculation would shift if such violations occurred because the overall effectiveness of the zone would diminish. Thus, even under the principle of proportionality, downing subsequent similar violators following adequate warning might be justifiable.

70. As noted in the *Nuclear Weapons* case, “[The] prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual self-defense if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter.” International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, General List No. 95, July 8, 1996, para. 41, 35 I.L.M. 814 (1996) [hereinafter *Nuclear Weapons*]. This point must not be carried to an extreme, for the Court was speaking to the issue of the resort to force, vice methods used to employ force. On the case, see Michael N. Schmitt, *The International Court of Justice and the Use of Nuclear Weapons*, 7 USAFA J. LEG. STU. 57 (1997) (and NAV. WAR C. REV., Spring 1998, at 91).

71. The listing of sources found in Article 38 of the Statute of the International Court of Justice is generally recognized as being set forth in priority order. It provides:

1. The Court . . . shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the consenting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and teachings of the most

highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, T.S. 993, 3 Bevans 1179.

72. U.N. CHARTER art. 103. The International Court of Justice has in fact noted the primacy of Security Council actions. In the *Lockerbie* case, the Court declined to indicate provisional measures requested by Libya on the basis that Charter obligations prevail over those in other agreements such as the Montreal Convention. The Charter obligations were contained in Resolution 748 (1992), which cited Chapter VII as its basis. The holding of the Court illustrates the degree to which Council actions are determinative: "Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention. . . ." Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Libya v. U.S.) 1992 I.C.J., para. 39, 31 I.L.M. 662 (1992). In *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 31, Oct. 2, 1995, 31 I.L.M. 32 (1996), the court rejected claims that the Security Council establishment of the Tribunal based on Chapter VII of the Charter was inappropriate. In particular, it stated that "the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken." It declined even to consider the question of legality.

73. The Vienna Convention on the Law of Treaties describes the norm, using the label "peremptory," as follows: "Art. 53. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), 63 AM. J. INT'L L. 875 (1969), 8 I.L.M. 679 (1969). It should be noted that Article 64 of the Convention provides that "if a new peremptory norm of general international law of the kind referred to in Article 53 emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* art., 64.

74. The entire issue of *jus cogens* norms is controversial. Indeed, in *North Sea Continental Shelf*, 1969 I.C.J. 4, 42, the International Court of Justice noted that it was not "attempting to enter into, still less pronounce on any question of *jus cogens*." In fact, there have been no cases in which a treaty provision, or implementation thereof, has been determined violative of a *jus cogens* norm. For conflicting views on the existence of *jus cogens* norms, see LAURI HANNIKAINEN, PEREMPTORY NORMS IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988) and JERZY SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL (1974).

75. On the distinction between international and non-international armed conflict, see GREEN, *supra* note 6, at 52–66; MALCOLM N. SHAW, INTERNATIONAL LAW 815–821 (4th ed. 1997).

76. The SROE guidance on the subject is as follows: "U.S. forces will always comply with the Law of Armed Conflict. However, not all situations involving the use of force are armed conflicts under international law. Those approving operational rules of engagement must determine if the internationally recognized Law of Armed Conflict applies. In those circumstances when armed conflict, under international law, does not exist, Law of Armed Conflict principles may nevertheless be applied as a matter of national policy. If armed conflict occurs, the actions of U.S. forces will be governed by both the Law of Armed Conflict and rules of engagement." SROE, *supra* note 4, at A-2 to A-3. The UN position is that the Law of Armed Conflict as articulated in the primary conventions (1949 Geneva Conventions, Protocols Additional, and the Cultural Property Convention) should apply in all peace operations. Draft Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to the United Nations Peacekeeping Operations, Report of the Secretary General (May 23, 1991), U.N. Doc. A/46/185, *reprinted in* UN PEACE OPERATIONS (Walter G. Sharp ed., 1995). The difficulty of determining the status of an armed conflict is illustrated by the case of the former Yugoslavia. Seemingly contradictory conclusions on the subject have been reached by the International Criminal Tribunal for the Former Yugoslavia. *Compare* Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-A, Appeals Chamber Judgment, Oct. 7, 1997 (finding an international conflict vis-à-vis the Bosnian Croats) with Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Opinion and Judgment, May 7, 1997. On these cases, see Leslie C. Green, Erdemovic-Tadic-Dokmanovic: Jurisdiction and Early Practice of the Yugoslav War Crimes Tribunal (unpublished manuscript on file with author, forthcoming in LESLIE C. GREEN, FURTHER ESSAYS ON THE MODERN LAW OF WAR, Transnational Pub.).

77. As has been pointed out by others, ROE can also be viewed as a crisis management tool for commanders that allows them, when unable to be present personally, to exercise positive control over their forces during stressful situations. Viewed thusly, ROE do not so much limit a commander's courses of action, as they frame them. On the point, *e.g.*, see Douglas C. Palmer, Rules of Engagement as an Operational Tool 1-3 (Feb. 22, 1993) (unpublished manuscript on file at NWC library).

78. There is evidence that fear of prosecution in the event the ROE are violated has also contributed to hesitation to act in self-defense. In February 1993, Army Specialist James Mowris and his platoon were on patrol in a Somali village when they saw two men running in an adjacent military area that was abandoned. Mowris chased them and, by his account, fired a warning shot into the ground to convince them to stop. One of the Somalis was killed. Mowris was subsequently convicted of negligent homicide in a trial that suggested the ROE on the use of force were poorly understood by the soldiers. The court-martial convening authority subsequently decided to set aside the conviction. Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 17, 66 (1994). Apparently, one consequence of the prosecution was that soldiers in Somalia "were reluctant to fire even when fired upon for fear of legal action. It took weeks to work through this. . . . There is no doubt that this case had a major effect on the theatre." Letter from Colonel Wade H. McManus, Jr., Commander, Division Support Command, to Major General Guy A.J. LaBoa, Subject: Specialist James D. Mowris (Sept. 28, 1993), *reprinted in* I Record of Trial, U.S. v. Mowris, GCM No. 68 (Fort Carson & 4th Inf. Div., July 1, 1993), *cited in id.* at 66.

79. The principle requires belligerents to distinguish between valid military targets and civilians and civilian objects. It is codified in Protocol I Additional, *supra* note 4, art. 51(4 & 5).

80. Deterrence, properly understood, is the product of the will and capacity perceived by the subject of the deterrent action.

81. The classic example of failure to adequately do so is the bombing of the Marine Headquarters at Beirut International Airport in October 1983. In that case, the ROE failed to account for an increase in the terrorist threat, as evidenced by the earlier bombing of the U.S. Embassy. Dep't of Defense, Report of the Commission on the Beirut International Airport Terrorist Act, October 23, 1983 (Dec. 20, 1983); various lectures by Professor Richard J. Grunawalt, Legal Counsel to the Commission, Naval War College, 1995–97.

82. In aerial operations, “operator” is a term of art for a flyer. It is absolutely essential that the judge advocate have a basic understanding of operational concepts and weapons system capabilities. For a survey of these matters, see Robert A. Coe & Michael N. Schmitt, *Fighter Ops for Shoe Clerks*, 42 A.F.L. REV. 49 (1997).

83. Recall, for instance, that Iraqi military helicopters penetrated the southern no-fly zone over Iraq to pick up pilgrims returning from the Haj. With regard to the decision not to engage the helicopters, DoD spokesman Kevin Bacon stated, “We are not prepared to stop what appear to be small-scale and humanitarian operations.” *Iraqi Copters Cross No-fly Zone*, TORONTO STAR, Apr. 23, 1997, at A-19.

84. A “combined operation” is “(a)n operation conducted by forces of two or more allied nations acting together for the accomplishment of a single mission.” Joint Pub 1-02, *supra* note 56, at 77.

85. For a superb discussion of the right to self-defense in international law, see YORAM DINSTEIN, WAR, AGGRESSION, AND SELF DEFENCE 175–308 (2d ed. 1994).

86. The hierarchy of self-defense is based in part on that set forth in the SROE. SROE, *supra* note 4, at A-4 to A-5. The SROE describe collective self-defense as a subset of national self-defense, and individual self-defense as a lesser included form of unit self-defense. It is probably more useful to think of them as separate entities that operate quite differently in differing contexts.

87. *Id.* at A-6.

88. This was made clear in the *Nuclear Weapons* case. There the International Court of Justice stated: “The submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) (I.C.J. Reports 1986, p. 94, para. 176): ‘there is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well-established in customary international law.’ This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.” *Nuclear Weapons*, *supra* note 70, at para. 41.

89. SROE, *supra* note 4, at A-6.

90. An act in self-defense must comport with both the elements of self-defense *and* the *jus in bello*. *Nuclear Weapons* case, *supra* note 70, at para. 42.

91. *Id.*

92. SROE, *supra* note 4, at GL-9.

93. *Id.*

94. Of course, ROE are always contextual. If a similar aircraft employing identical tactics approached the no-fly-zone boundary the previous day and attacked an enforcement aircraft, the threshold for engaging on this day would certainly be lower.

95. The MiG-25 downed by the SOUTHERN WATCH F-16 in December 1993 was likely testing U.S. resolve to enforce the zone. Petersen, *supra* note 2, at 8; William Matthews, *Coverage of Iraqi No-fly Zone Increases*, A. F. TIMES, Jan. 11, 1993, at 4.

96. The SROE cite four factors without amplification: 1) the state of international/regional political tension; 2) military preparations; 3) intelligence; and 4) indications and warning information. SROE, *supra* note 4, at GL-9.

97. This is likely to be the case, e.g., in the event of a mistaken enforcement action, such as the Black Hawk shootdowns. Another example of a period posing such a risk was during the Iraqi involvement in the Kurdish in-fighting, the shift from Operation PROVIDE COMFORT to NORTHERN WATCH, and the resulting pullout of French forces.

98. A SAMbush occurs when a SAM system “ambushes” an enforcement aircraft. For example, a mobile SAM system could be placed in a hidden location near the no-fly boundary. A “bait” aircraft might then fly quickly towards the line knowing this will cause the enforcement aircraft to maneuver into a position to engage the potential violator that is within range of the hidden SAM site. This is but one possible SAMbush scenario.

99. Stand-downs are used to prepare the aircraft, plan, and ensure adequate rest for aircrews prior to combat.

100. Chaff consists of metallic filaments released by the aircraft to disrupt ground-based radar by creating returns that effectively “cloud” it over. Flares are dropped to disrupt heat-seeking missiles. See Coe & Schmitt, *supra* note 82, at 81.

101. If so, not only does this lower the likelihood of the act constituting hostile intent, it allows the aircrew greater time to make the hostile intent determination.

102. That said, operators will typically look to the judge advocate to do so, pointing out the difficulty of making a complex determination in the mere seconds available in the cockpit. Self-defense being a legal standard, operators expect the judge advocate to determine which acts meet it. The temptation to do so must be resisted, for such a list places both national policy and aircrews at risk. The list will inevitably tend to be viewed as exclusive.

103. The SROE language is as follows: “Commanders should use all available information to determine hostile intent. Intelligence, politico-military factors, and technological capabilities require a commander to consider a wide range of criteria in determining the existence of hostile intent. No list of indicators can substitute for the commander’s judgment. The following guidance is not meant to be a ‘checklist’ but rather examples which taken alone or in combination might lead a commander to determine that a force is evidencing hostile intent. Among the actions that might lead to a reasonable belief that hostile intent exists are. . . .” SROE, *supra* note 4, at A-B-1. Though this particular caveat is for seaborne forces, a similarly worded proviso would be appropriate for aerial operations.

104. For a discussion of this issue, see George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?* NAVAL WAR C. REV., May-June 1986, at 69. The concern that political pressure will require excessive risk-taking is not new. During the Falklands Campaign, the Commander of the Falklands Battle Group was worried that “political requirements could result in our entering [the exclusion zone around the Falklands declared by the British] with our hands tied behind our backs. I thought it was all too possible that I was going to be told again, ‘The enemy must fire the first shot.’” He was worried that his political masters would want the United Kingdom to appear the “wronged party.” SANDY WOODWARD, ONE HUNDRED DAYS: THE MEMOIRS OF THE FALKLANDS BATTLE GROUP COMMANDER 108 (1992). Admiral Woodward’s concern appears well founded. In a joint U.S. Naval War College and UK Royal Naval Staff College seminar held in October 1996, the British position was that “UK ROE will normally accept the risk of first hit, i.e., do not fire unless fired on.” Royal Navy Staff College Background Paper, ROE. Political Tool or Military Nightmare? (undated, n.p., on file with author).

105. Professor Dinstein adopts the terminology “interceptive” self-defense. It occurs after the other side has “committed itself to an armed attack in an ostensibly irrevocable way.” He argues that interceptive self-defense is consistent with Article 51. DINSTEIN, *supra* note 85, at 190.

106. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), reprinted in JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW 411, 412 (emphasis added). The *Caroline* incident involved a Canadian insurrection in 1837. After being defeated, the insurgents retreated into the United States where they recruited and planned further operations. The *Caroline* was being used by the rebels. British troops crossed the border and destroyed the *Caroline* by setting fire to the vessel and sending her over Niagara Falls. Britain justified the action on the grounds that the United States was not enforcing its laws along the frontier and that the action was a legitimate exercise of self-defense. 2 DIGEST, *supra*, at 409-11.

107. International Military Tribunal (Nuremberg), Judgment and Sentence, 41 AM. J. INT’L L. 172, 205 (1947). The German leaders tried to justify the invasion of Norway as self-defense against an anticipated British attack from Norway.

108. Along these same lines, it is occasionally asked whether an aircraft must “call home” to seek authority to act in self-defense. The SROE do require that the threatened aircraft call home if time permits. However, if there is time to radio to the air operations center (AOC) for instructions, usually the threat is not imminent. The crew may seek general guidance (or even authority to engage under the mission accomplishment rules), but in most cases it may not engage in self-defense until there is no longer time to call home—until the need is “instant and overwhelming.” Simply put, the imminency requirement is that an enforcement aircraft may not act in self-defense until it has to, but it need not necessarily wait until the hostile intent is about to become a hostile act.

109. Of course, though the right to self-defense is no longer operative, it cannot be overemphasized that mission accomplishment ROE may provide a separate and distinct authorization to engage.

110. Note that a “clear and unambiguous” breaking off of the engagement will be difficult to discern. Therefore, it is tactically sound and legally acceptable to continue the fight until convinced it is over.

111. It would also appear to conflict with the general approach to surrender of aircraft during armed conflict, i.e., that surrenders are seldom accepted in aerial combat because of the difficulty of verifying true status. DEPT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (AFP 110-31), para. 4-2d (1976).

112. Such missions are labeled SEAD—suppression of enemy air defenses. When the sites are actually destroyed, vice simply suppressed for a period sufficient to allow friendly aircraft to transit the area, SEAD is sometimes labeled DEAD—destruction of enemy air defenses. See Coe & Schmitt, *supra* note 82, at 53. It is important to understand that tactics are situation specific. If the aircraft being threatened is armed with a HARM, a missile specifically designed to home in on a target’s radar emission (and thus very useful against SAM sites), then the best course of action may well be to attack immediately. For this reason, it may be prudent to send a HARM “shooter” into the WEZ first to determine whether the SAM site is likely to act aggressively. Descriptions of air-to-ground weapons are found in *id.* at 67-70.

113. This is a particular problem for reconnaissance missions. No-fly zone or associated operations generally have a reconnaissance component to allow the task force to remain apprised of the threat to enforcement aircraft. Unfortunately, tactical reconnaissance aircraft usually must fly within the WEZ of the site it is imaging to secure photos that are of sufficient clarity for use in identifying threats. Thus, such aircraft cannot simply fly around or above

ground-based threat systems.

It should be pointed out, in this regard, that the U.S. definition of self-defense does allow a reaction to hostile acts intended to impede the *mission*. Illumination with fire control radar, however, is a demonstration of hostile intent, not a hostile act, and the hostile intent provision does not extend to impeding mission accomplishment. Moreover, as a matter of international law vice national policy, acting in response to an effort to impede the mission is more an act of *self-help* than of self-defense, though the use of force as a means of self-help under the Charter regime is controversial. See VON GHLAHN, *supra* note 6, at 633–62. On self-help in a peacetime context, see Corfu Channel, *supra* note 49.

114. This possibly became somewhat of a reality in Operation DENY FLIGHT. NATO commanders wanted to attack SAM sites in Bosnia-Herzegovina that threatened enforcement aircraft. The UN disapproved the proposal out of fear that the action might result in retaliation against UNPROFOR troops on the ground. As a result, NATO aircraft enforcing the ban were required to fly outside the WEZs of known sites. Steven Watkins, *Does Deny Flight Still Work?* A. F. TIMES, July 24, 1995, at 3. In this case, operational concerns gave way in the face of greater UN policy implementation.

115. One must be careful about black and white characterizations of lawfulness. The determination of actual necessity will be made in the cockpit based on the aircrew's subjective judgment.

116. SROE, *supra* note 4, at A–5.

117. For instance, the IFOR (ground) ROE guidelines on opening fire provided, "You may only open fire against a person if he/she is committing or about to commit an act LIKELY TO ENDANGER LIFE, AND THERE IS NO OTHER WAY TO STOP THE HOSTILE ACT" (emphasis in original). Force Commander's Policy Directive Number 13, Rules of Engagement, Part I: Ground Forces, July 19, 1993, reprinted in Bruce D. Berkowitz, *Rules of Engagement for U.N. Peacekeeping Forces in Bosnia*, ORBIS, Fall 1994, at 635, 643.

118. This does not mean that an attack on the country's air defense system would be illegal. It simply means that it would not be justifiable under the principle of self-defense. This point emphasizes the fact that actions during no-fly operations, other than in self-defense, are essentially political in nature.

119. Care must be taken not to read this principle too liberally. It is not a justification for risking the downed survivor. Uncertainty should always be resolved in favor of protecting the crew member or other assets involved in the CSAR effort.

120. SROE, *supra* note 4, at A–5.

121. *Id.* at GL–10.

122. See, e.g., *The Hostage Case* (U.S. v. List), 11 T.W.C. 759 (1950) (acquitting general who had ordered destruction during German evacuation of Norway on basis that destruction was necessary due to general's mistaken belief that Soviets were pursuing his forces). For an example of such an evaluation in the context of state-sponsored assassination, see Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 648–650 (1992).

123. For an excellent article on ground forces ROE and training, which contains many principles that can be applied to the aerial environment by analogy, see Martin, *supra* note 78.

124. The SROE includes the following provision repeatedly throughout the document. "These rules do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense of the commander's unit and other U.S. forces in the vicinity." See e.g., SROE, *supra* note 4, at A–3.

125. The relevant provisions of the SROE are as follows:

(1) U.S. forces assigned to the OPCODE [operational control] of a multinational force will follow the ROE of the multinational force unless otherwise directed by the NCA. US forces will be assigned and remain OPCODE to a multinational force only if the combatant commander and higher authority determine that the ROE for that multinational force are consistent with the policy guidance on unit self-defense and with the rules for individual self-defense contained in this document.

(2) When U.S. forces, under US OPCODE, operate in conjunction with a multinational force, reasonable efforts will be made to effect common ROE. If such ROE cannot be established, U.S. forces will exercise the right and obligation of self-defense contained in this document while seeking guidance from the appropriate combatant command. To avoid mutual interference, the multinational force will be informed prior to U.S. participation in the operation of the U.S. forces' intentions to operate under these SROE and to exercise unit self-defense.

Id. at A-1. The need to seek common ROE extends beyond multinational concerns to the consistency of ROE as between U.S. forces. On at least two occasions, different sets of ROE applicable to U.S. forces have not been consistent. During operations in Somalia in 1994, there was a point at which U.S. snipers had more restrictive ROE than those assigned to UNOSOM II (United Nations Operations in Somalia II). This was the result of an incident in which a U.S. sniper acting in compliance with the ROE killed a Somali in the back of a truck armed with a crew-served weapon that was approaching a U.S. compound. Soon thereafter, Somalis appeared charging that he had shot a pregnant woman. In the ensuing brouhaha, the U.S. JTF changed its rules on snipers, while UNOSOM did not. See F.M. Lorenz, *Rules of Engagement in Somalia: Were they Effective?* 42 NAVAL L. REV. 62, 69-72 (1995). The second incident occurred during Operation JOINT ENDEAVOR. When the operation commenced, some U.S. forces involved were assigned to IFOR, while others were not. The former applied NATO ROE; non-IFOR troops were governed by U.S. ROE, including the SROE. NATO ROE were eventually made applicable to all U.S. forces in the Area of Responsibility (AOR). Letter from Headquarters, European Command to Commandant (sic), Naval War College, Subj: Lessons Learned from Operation JOINT ENDEAVOR, June 28, 1996, USAFE/JA Joint Universal Lessons Learned (JULL) (n.p.) (on file with author).

126. SROE, *supra* note 4. On the SROE generally, see Grunawalt, *supra* note 4.

127. The previous rules primarily governed operations during peacetime. The decision was made that this approach had the potential for creating confusion in the transition from peace to war. Therefore, the current iteration was designed to apply regardless of the state of conflict. The 1988 Peacetime Rules of Engagement were promulgated by Memorandum from Secretary of the Joint Staff for Unified and Specified Combatant Commanders and Commander U.S. Element, NORAD, Peacetime Rules of Engagement for U.S. Forces (Oct 28, 1988) (on file with Oceans Law and Policy Dep't, Naval War College). The current ROE provide: "These ROE apply to U.S. forces during all military operations and contingencies. Except as augmented by supplemental ROE for specific operations, missions, or projects, the policies and procedures established herein remain in effect until rescinded." Chairman of the Joint Chiefs of Staff Instruction (CJCSI 3121.01), CJCS Cover Letter (the Instruction itself), Oct. 1, 1994, at para 3. The SROE do not apply when military forces are assisting federal and local authorities during a civil disturbance or disaster. *Id.* at A-2.

128. Unless, of course, there are combined rules of engagement for the particular operation with which all contributing States must comply. In such cases, the combined operation's rules

supplant the SROE for the purposes of that operation. As noted above, though, the U.S. will not be bound by such rules unless they are consistent with the U.S. position on self-defense.

129. Though much of the enclosure is classified, the first eight pages contain general information on self-defense that is not. This section can be used as a strawman for the development of coalition self-defense ROE.

130. The Combatant Commands are established in 10 U.S.C. 164. In layman's terms, they are the broadest military organizations which employ combat forces. Combatant commands report directly to the NCA (President and Secretary of Defense). They may be organized either geographically or functionally. The five geographic commands are Atlantic Command (primarily continental U.S.), European Command, Pacific Command, Central Command (Middle East), and Southern Command (Latin America). The functional commands are Strategic Command, Transportation Command, Special Operations Command, and Space Command. On command relationships, see Joint Chiefs of Staff, Unified Action Armed Forces (Joint Publication 0-2), Feb. 24, 1995.

131. For instance, NORTHERN WATCH is a European Command operation, whereas SOUTHERN WATCH falls under the control of Central Command. Only Central Command, Pacific Command, and Southern Command have issued ROE of their own.

132. Drawing on a naval example, some States define disabling fire as firing into the rudder, whereas others define it as firing into the bridge. Similarly, warning shots at sea are variously described as firing across the bow, firing into the funnel, and raking the bridge.

133. The planning and execution process for U.S. military operations is described in JOINT CHIEFS OF STAFF, DOCTRINE FOR PLANNING JOINT OPERATIONS (Joint Pub. 5-0), April 23, 1995.

134. The bombing of the Marine Barracks in Beirut in 1983 is the generally cited example of failure in this regard. The Commission found that the "ROE contributed to a mind-set that detracted from the readiness of the [Marines] to respond to the terrorist threat which materialized on 23 October 1983." Commission Report, *supra* note 81, at 135.

135. E.g., the missile may not have the range of the radar associated with the SAM system.

136. This rather black and white assertion must be tempered by operational prudence. For instance, intelligence sources may indicate a missile has a certain range, but it may, in fact, have a greater range than advertised or previously witnessed.

137. Radars operate in various modes. In the acquisition mode, they simply search the sky for targets. In the target tracking (fire control) mode, they are locked on to and follow a particular target in preparation for launch. In missile guidance mode, radar guides a missile that has been launched to target. Whether or not the functions are distinct (and distinguishable by aircraft) depends on the radar system. For example, the phased array radar on an Aegis cruiser performs all three functions.

138. The guidance can take multiple forms. In Operation NORTHERN WATCH, e.g., it is in a booklet entitled the Commander's Guidance on the Application of the Rules of Engagement, which is one part of an overall set of guidance labeled the Consolidated Operating Standards. In SOUTHERN WATCH, by contrast, the guidance is contained in a Special Instruction (SPIN) issued by the JTF Commander.

139. For example, by employing the technique of illuminating aircraft with SAM system fire control radars discussed *supra* in the section on self-defense.

140. The mission is performed by the U.N. Special Commission (UNSCOM).

141. This need is compounded by the distribution of similar aircraft in the air forces of many States. For instance, during DESERT STORM, both Iraq and members of the Coalition flew French-made Mirages and Soviet-built MiGs.

142. Over the course of the last fifty years, there have been a number of incidents in which military aircraft were downed during peacetime operations. For instance, in 1952 and 1954, Soviet aircraft shot down B-29s over Japan, in 1953 a USAF F-84 was downed by Czech fighters, and the Soviets shot down a U.S. Navy P-2 in 1959. In each case, international condemnation focused on the fact that the aircraft had inadvertently, vice intentionally, violated foreign airspace. However, when a U-2 was shot down by the Soviets over Soviet territory in 1960 there was a relative lack of condemnation. These incidents would tend to support the contention that it is intent of the downed aircraft that will drive international assessments of legality. In the case of a no-fly zone, the intent of a combat aircraft to violate an internationally "sanctioned" prohibition approaches *res ipsa loquitor* status. On the incidents, and the reaction thereto, see 1956 I.C.J. Pleadings, Aerial Incident of Oct. 7, 1952 (U.S. v. U.S.S.R.); 1959 I.C.J. Pleadings, Aerial Incident of Nov. 7, 1954 (U.S. v. U.S.S.R.); 1956 I.C.J. Pleadings, Aerial Incident of Mar. 10, 1953 (U.S. v. Czech); 1958 I.C.J. Pleadings, Aerial Incident of Sept. 4, 1954 (U.S. v. U.S.S.R.); Schmitt, *Aerial Blockades*, *supra* note 7, at 51-52.

143. One hundred six deaths resulted. KAL 007 was certainly not the first incident of a civil airliner being downed. In 1954 the Chinese shot down a Cathay Pacific airliner which they mistakenly believed to be a Nationalist Chinese military aircraft. Keesings Contemporary Archives 13733 (1954). Other incidents of downing civil airliners include downings of: an Air France airliner over Berlin in 1952; an El Al airliner in 1955 by Bulgaria; a Libyan airliner by the Israelis over the Sinai Peninsula in 1973; and the forced landing of a Korean Air Lines aircraft in 1983 by the Soviets. See Schmitt, *Aerial Blockades*, *supra* note 7, at 52. See also Bin Cheng, *The Destruction of KAL Flight KE007, and Article 3 Bis of the Chicago Convention*, in AIRWORTHY: LIBER AMICORUM HONOURING PROFESSOR DR. I.H. PH. DIERDERICKS-VERSCHOOR 49, 55 (J.W.E. Storm van Gravesande & A. van der Veen Vonk eds., 1985); Craig A. Morgan, *The Shooting of Korean Airlines Flight 007: Responses to Unauthorized Intrusions*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 202, 204-210 (W. Michael Reisman & Andrew Willard eds., 1988); and John T. Phelps, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 266-274 (1985).

144. The text of the draft resolution (S/15966/Rev. 1) is reprinted at 22 I.L.M. 1148 (1983). Poland also voted against the resolution, and the P.R.C., Guyana, Nicaragua, and Zimbabwe abstained. U.N. Doc. S/PV.2476 (1983), reprinted in 22 I.L.M. 1138, 1144 (1983).

145. ICAO Council Resolution, Sept. 16, 1983, 22 I.L.M. 1150 (1983).

146. ICAO Council Resolution, Mar. 6, 1984, 23 I.L.M. 937 (1984).

147. Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 3 *bis*), May 10, 1984, reprinted in 23 I.L.M. 707 (1984).

148. Use of the term "recognize," in light of rules of interpretation, would suggest it was intended to be declaratory. For a discussion of Article 3 *bis*, see Cheng, *supra* note 143, at 60-61; Gerald F. Fitzgerald, *The Use of Force Against Civil Aircraft: The Aftermath of the KAL 007 Incident*, 1984 CAN. Y.B. INT'L L. 291; Michael Milde, *The Chicago Convention After 40 Years*, 9 ANNALS OF AIR & SPACE LAW 119 (1984).

149. Convention on International Civil Aviation (Chicago Convention), Dec. 7, 1944, annex 2 (Rules of the Air), 15 U.N.T.S. 295, T.I.A.S. No. 1591, 61 Stat. (2) 1180, 3 Bevans 944, reprinted in 22 I.L.M. 1154 (1983). See also, Schmitt, *Aerial Blockades*, *supra* note 7, at 56-64.

150. The F-15 pilots misidentified the Black Hawks as Iraqi Mi-24 Hinds during their visual identification. See Aircraft Accident Investigation Board Report, Executive Summary, Vol. I (May 27, 1994) at para. 3 (on file with author).

151. Legally, it does not matter where the level is set, so long as the execution of the engagement, and the criteria therefore, are appropriate. Of course, the system of authorization

cannot be so complex that it fails to function effectively. It has been argued that during DENY FLIGHT, the requirement to secure both NATO and UN approval for the use of force (in mission accomplishment) frustrated accomplishment of the mission. The problem was not that of connectivity (i.e., technology for communications), but rather unwieldy and slow decision-making. See Brian G. Gawne, *Dual Key Command and Control in Operation Deny Flight: Paralyzed by Design* (Nov. 1996) (unpublished manuscript on file at NWC library).

152. For instance, in the case of the four Galebs shot down by NATO fighters in 1994, they were first warned by NATO AWACS monitoring the area. They then were warned off by the fighters. After these warnings went unheeded, the fighters had to secure authority from the NATO Combined Air Operations Center before they could engage the violators. Nash, *supra* note 52, at 524.

153. On the threats, see *Containing Saddam*, THE ECONOMIST, Nov. 15, 1997, at 16; *Saddam v. the UN, Continued*, THE ECONOMIST, Nov. 15, 1997, at 43.

154. For example, if operations are run out of a base in country X, can country X's aircraft be defended even if they are engaged in operations wholly unrelated to the no-fly enforcement operation? The default answer is no, absent authorization to the contrary.

155. E.g., do the ROE permit forces to cross a border in order to effectively defend X's aircraft?

156. *Nicaragua Case*, *supra* note 20, at 104–5.

157. Of course, this begs the policy question of why U.S. forces should place themselves at risk in circumstances in which a State's own forces would not do so.

158. The classic example is cross-border operations during Operations PROVIDE COMFORT and NORTHERN WATCH against Kurds using northern Iraq as a sanctuary in their war against the Turks. Turkey is also at odds on a recurring basis with Syria.

159. Trail Smelter was a case involving a smelter that was discharging sulfur dioxide near Trail, British Columbia. The United States alleged that the sulfur dioxide drifted over parts of Washington. The arbitration tribunal held for the United States on the ground that countries have a duty not to use, or allow the use of, their territory for activities harmful to another State. *Trail Smelter (U.S. v. Can.)* 3 R.I.A.A. 1911, 1965 (1941).

160. See AFP 110–31, *supra* note 111, at para. 2–5; DEPT OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1–14M), para. 2.5.1 (1995). Note, e.g., that in the law of the sea there is a right to innocent passage through the territorial sea. No such right exists in the airspace. NWP 1–14M, *id.* at para. 2.5.1.

161. For an excellent discussion of aerial hot pursuit, see N.M. POULANTZAS, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 271–352 (1969). Roach cites a form of pursuit labeled “self-defense pursuit,” distinguishing it from the hot pursuit of the law of the sea. Roach, *supra* note 4, at 50. Self-defense pursuit would certainly be appropriate in the aerial environment; however, because of the speeds involved, it would be less a pursuit than merely an ongoing engagement.

162. Poulantzas describes incidents of pursuit during armed conflicts not amounting to war, rejecting the contention that a right to enter a 3rd State's territory exists absent consent. POULANTZAS, *supra* note 161, at 329–338.

163. Note that the State would be obligated to act to keep its territory from becoming a sanctuary by virtue of Article 2(5) of the Charter. That article provides that “(a)ll Members . . . shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.” U.N. CHARTER art. 2(5).

164. The classic case on sanctuary in the law of armed conflict involves the *Altmark*, a German naval auxiliary vessel during the Second World War. In 1940, the *Altmark* transited

Norwegian territorial waters carrying British prisoners. Permission to transit had been granted by the Norwegians, who had also refused British requests that the vessel be searched for prisoners. After the *Altmark* had passed through nearly 400 miles of Norwegian waters, a British destroyer entered the waters and released the prisoners. The British justified their action in part on the basis that the German vessel was using Norwegian waters improperly as sanctuary. On the incident, see ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 236–39 (50 Naval War College International Law Studies, 1955).

165. A colorable argument could be offered that crossing into the sanctuary State would be authorized by the original mandate because the sanctuary State is unable or unwilling to comply with its own obligations under the Charter. However, doing so may present a very real threat in terms of an intercept on enforcement aircraft by sanctuary aircraft alleging a violation of their airspace. Further, it would certainly be less politically disruptive to allow the Security Council to address the matter.

166. The Air Force law of war manual states that “No settled international rule permits intrusion of military aircraft into national airspace on the grounds of mistake, duress, distress or other *force majeure*.” AFP 110–31, *supra* note 111, para. 2–5d. The Navy version, by contrast notes that “(a)ircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights.” NWP 1–14M, *supra* note 160, para. 2.5.1.

167. The right of assistance entry into airspace is less settled. On the U.S. policy regarding assistance entry, see Joint Staff, Guidance for the Exercise of Right of Assistance Entry (CJCSI 2410.01A), Apr. 23, 1997.

168. In fact, there is just such an obligation in international agreements for the recovery of astronauts. See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art. V, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205; Agreement on the Rescue of Astronauts, and the Return of Objects Launched into Outer Space, arts. 1–4, Apr. 22, 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599, 672 U.N.T.S. 119.

169. As a practical matter, in a CSAR situation it may be more dangerous to attempt to defend the downed crew member than seek “repatriation” after capture. The on-scene commander must direct only tactically sound and safe procedures unlikely to worsen the crew member’s situation.

170. The risk of a mistake is two-fold. First, there are aircraft which are not forbidden to fly in the zone (e.g., relief aircraft). Secondly, there is always the possibility of a blue-on-blue engagement, i.e., one in which a friendly aircraft is engaged. For a brief discussion of this latter issue, see Paul M. Ziegler, Considerations for the Development of Theater Hostilities Rules of Engagement: Blue-on-Blue Versus Capability Sacrifice (Nov. 1992) (unpublished manuscript on file at NWC library).

171. On the issue of IFF squawks, see Coe & Schmitt, *supra* note 82, at 78–79. The importance of IFF was tragically demonstrated in the Black Hawk incident. The helicopters were squawking a Mode I code that was incorrect for the location they were in. The Mode IV code for “friendly” was only received momentarily by the lead F–15. The wingman received no Mode IV response. It remains unexplained as to why the Mode IV interrogation was unsuccessful. Board Report, Executive Summary, *supra* note 150, at 5.

XIII

The Emerging Role of NATO in UN Peace Enforcement Operations

James P. Terry

THE RAPID GROWTH OF PEACE ENFORCEMENT REQUIREMENTS has obliged the United Nations to seek new avenues of cooperation with groups of member States already organized for joint military action, such as NATO.¹ This fact, coupled with Congressional concern that American forces serve under responsible leadership and that strict standards are adhered to in determining whether U.S. forces should participate in any peace enforcement operation, suggests that U.S. participation in such operations will be significantly restructured in the future.

This restructured participation in international peacekeeping will likely drive similar rethinking among our major allies and other regular contributors to these operations. From the U.S. perspective, participation in these operations must now comply with the tenets of Presidential Decision Directive (PDD) 25.² This directive, which requires clear accountability in deciding when to participate, when to assign forces, and under what conditions, will likely preclude U.S. participation in Somalia-style operations in which UN leadership proved inadequate.³

The renewed U.S. interest in extending the NATO Charter to encompass threats beyond present NATO borders,⁴ as evidenced in the current NATO-led

Bosnia peace operation, suggests regional organizations such as NATO may become the leadership element of choice for future UN-sponsored peacekeeping and peace enforcement operations.

U.S. Concerns with UN-Led Peace Operations

Recent U.S. experience with the United Nations suggests that there are a limited number of States with the experience required to lead peace enforcement operations effectively. This creates difficulties in two ways. While the UN must rely upon those states with experienced leadership and highly trained forces for its more difficult operations to succeed, it must also provide some opportunity for participation to each of its 188 member States. This suggests that the UN must be encouraged to increase its capability to conduct Chapter VI peacekeeping operations⁵ where a cease-fire exists and enforcement issues are minimal, and that Chapter VII enforcement operations⁶ might be better left to regional organizations such as NATO under Chapter VIII of the UN Charter.

In the nearly seven years since our participation and leadership role in Operation Desert Shield/Desert Storm in support of the government of Kuwait, the United States has contributed significant forces, at great financial cost, to three complex military initiatives conducted under the authority and direction of the UN, and one currently being undertaken under NATO leadership. The military commitments undertaken under UN leadership in Somalia, Haiti, and Bosnia,⁷ as well as the current NATO-led operation in Bosnia,⁸ responded to multilateral requests for assistance voted upon in Security Council Resolutions. In another, the humanitarian effort in Rwanda, our participation was significant, although combat troops were not directly engaged. In each instance of our participation under UN leadership, the resulting opposition by Congressional leaders has been forcefully expressed on the floor of the House and Senate. In the case of Somalia, the Byrd and Kempthorne Amendments forced the U.S. withdrawal from that theater by 31 March 1994.⁹

The carefully developed response of the Clinton administration to these legislative pressures is found in PDD 25. The U.S. has strongly encouraged the UN and its Department of Peacekeeping Operations (DPKO) to institutionalize a similar policy analysis in its review of those troubled areas where the use of military force may be the only available international option. We have recently witnessed greater discrimination in DPKO decision-making

with respect to proposed operations in Burundi, Liberia, and Angola, suggesting the UN's own recognition of the benefit of this rigorous analysis.

What may be more significant for the UN is its apparent recognition of its own limitations in addressing peace enforcement operations under Chapter VII of the UN Charter where "all necessary means" are required. In supporting the current NATO leadership role in Bosnia, the UN leadership appears to have faced up to its lack of credibility in the areas of logistics support, intelligence gathering, operational leadership, and necessary airlift. For U.S. leaders, it is apparent the PDD 25 analysis simply will not authorize continued U.S. support for a UN leadership role in these operations—especially if regional organizations such as NATO can successfully exercise an expanded charter.

PDD 25 Principles Support Leadership by Regional Organizations

Presidential Decision Directive 25, signed in May 1994, is based upon the same principles that underlie the Weinberger Doctrine¹⁰ of 1984. The Directive provides for careful analysis of those factors most relevant to determining whether, when, how, and to what degree the U.S. should participate militarily in international peacekeeping and peace enforcement operations. The PDD 25 policy also requires a thorough assessment and continuing reassessment of our role to ensure that the operation to which we have committed forces is effective, well led, and operating within appropriate rules of engagement. The integrated leadership structure within NATO allows for this required assessment process, while UN-led force structures, such as those cobbled together in recent years for peace enforcement, may not.

The impetus for the PDD, like the Weinberger Doctrine before it, came from a tragic loss of U.S. lives while U.S. forces were serving at the behest of the international community. Just as the purpose of the 1984 doctrine was to prevent the reoccurrence of another Beirut bombing incident in which 241 servicemen lost their lives to Shiite extremists, the immediate purpose of the PDD was to prevent another disaster such as we experienced in Mogadishu, Somalia, where eighteen Americans were killed by General Mohammed Farah Aidid's forces in October 1993.¹¹

The bombing in Beirut can be traced in part to an unwitting shift in the U.S. operational posture from that of a non-partisan U.S. force patrolling various areas of the city and providing security at the Beirut International Airport to that of a partisan force with U.S. naval forces executing fire missions on behalf of the Lebanese Armed Forces. The tragedy in Mogadishu was similar in that our operational awareness of the intentions of Aidid was lacking and the force

committed did not reflect the actual requirements. Both PDD 25 and the Weinberger principles are designed to preclude the same lack of situational awareness that arose in Beirut and Somalia.

When Secretary Caspar W. Weinberger outlined specific requirements for U.S. military involvement, he was not concerned with peace operations *per se*.¹² Nevertheless, those principles, stated below, remain cogent, rational beacons in any reasoned analysis of the conditions underlying a decision to commit forces in every military operation, to include peacekeeping and peace enforcement under a NATO aegis.

- Any use of force must be predicated upon a matter deemed vital to our national interest.
- The commitment must be undertaken with the clear intention of winning.
 - We must have clearly defined political and military objectives.
 - The forces committed must be sufficient to meet the objectives.
 - There must be reasonable assurance that we have the support of the American people.
- The commitment of U.S. forces to combat must be a last resort.

Similarly, the principles within PDD 25 are presented as factors to be considered in a decision to commit U.S. forces, and equally important, as criteria required for the successful deployment of those forces. Of necessity, the conditions and requirements for a Chapter VII peace enforcement action are greater than for a Chapter VI peacekeeping initiative. As a necessary first step, the PDD requires that before voting for and supporting a peacekeeping or peace enforcement operation in the UN Security Council, the U.S. must ask whether the situation represents a threat to international peace and security. Second, does the proposed operation, as outlined by the Secretary General or the leadership of a regional organization, have a defined scope with clear objectives? Third, is there an international community of interest for dealing with the problem on a multilateral basis? Fourth, if a Chapter VI peacekeeping operation is contemplated, is there a working cease-fire in place? Fifth, are there financial and human resources available? Finally, is there an identifiable end-point?

These are the same factors the U.S. considered in supporting the current NATO-sponsored peace operation in Bosnia. The PDD similarly requires that these factors be considered in determining when to extend an existing operation, such as recently occurred when the Congress approved the Administration's decision to extend the Bosnia operation. In addition, when significant U.S. troop involvement is contemplated in peace enforcement

operations where all necessary means are authorized, U.S. decision makers must now ask whether we have:

- The ability to commit sufficient forces to achieve our clearly defined political and military objectives;
- A clear intention to decisively achieve these objectives; and
- The commitment on the part of the UN or a regional organization to continually reassess and adjust the objectives, rules of engagement, and composition of the force to meet changing operational demands.

In committing to participate in the current peace enforcement initiative in Bosnia, President William Clinton determined that the PDD 25 requirements could only be met through a NATO-led operation. While U.S. leaders recognized that a cohesive force led by NATO leaders offered a more effective means of “executing” the UN mission in Bosnia, there is recognition on the part of all NATO members that the UN must remain the primary international “authority” under whose aegis these operations are conducted.

NATO’s Role in International Peacekeeping Under the UN Charter

Chapter VIII of the UN Charter¹³ refers to regional organizations, such as NATO, in the context of appropriate regional action in the maintenance of international peace and security.¹⁴ It is in this area that a relationship exists between the two organizations, with ultimate authority centered in the United Nations. Excepting the area of international peace and security, however, the relationship between the UN and NATO is not hierarchical.

When the NATO Charter was established in 1949 by the Treaty of Washington,¹⁵ it made no mention of any relationship to the Security Council as a “regional arrangement,” nor did it contain any provision providing for action only upon the authorization of the Security Council, or for reporting activities “in contemplation.” Instead, the Treaty of Washington expressed the obligation of NATO’s member states to be that of “collective self-defense” under Article 51 of the UN Charter and, correspondingly, embodied only the obligation to report “measures taken” to the Security Council.¹⁶ This formulation was adopted by the United States and its NATO allies because subordination of NATO actions as a regional arrangement to Security Council review in advance during the Cold War would have subjected all actions to Soviet veto. By characterizing NATO’s military actions as “collective self-defense” under Article 51, there would be no action of a “regional arrangement” under Chapter VIII of the UN Charter and no prior Security Council review.

The concerns described above and similar concerns with regard to a possible Chinese veto have, at least for now, dissolved. With the internal disintegration of the Soviet Union in 1990–1991 and the events in Tiananmen Square in the People's Republic of China, those two permanent members of the Security Council have become more willing to support UN-directed involvement in peacekeeping and peace enforcement operations.

During his campaign for President of Russia in 1991, moreover, Boris Yeltsin committed to voting for Security Council initiatives which would support democratic principles. His current entreaties for continued U.S. financial assistance should ensure that Russia will not act unreasonably in that forum. Similarly, the fallout from the 1989 events in Beijing's Tiananmen Square has caused the People's Republic of China to be extremely careful in their actions in the United Nations and elsewhere lest they risk their "most favored nation" treatment by the United States.¹⁷

The issues for the United States today in determining whether to support a response by a regional organization under Chapter VIII or that of the UN as a whole are more pragmatic than political. Our recent experience in Somalia with UNOSOM II and Bosnia with UNPROFOR suggest that UN-led operations may not be capable of undertaking Chapter VII (all necessary means) missions.¹⁸ These peace enforcement missions require careful planning, experienced leadership, and highly integrated command and control arrangements. This combination is required to execute sophisticated air-ground coordination and air-artillery deconfliction as well as to implement robust rules of engagement that will protect the force and the civilian population. Most importantly, this cohesion is absolutely essential if forces with different experience levels and capabilities are to be successfully integrated to create force multiplication rather than force division. UN-led peace enforcement operations, unless directed by one of a handful of states, will continue to have difficulty achieving this integration. It is this understanding that underlies the U.S. support for the current NATO-led peace enforcement operation in Bosnia.

NATO As a Regional Organization: Chapter VIII in Operation

The adaptation of NATO to a role as a Regional Organization under Chapter VIII with a peace enforcement charter must be viewed as part of a broad, long-term U.S. and Allied strategy that supports the evolution of a peaceful and democratic Europe. This strategy benefits U.S. security and builds on the bipartisan premise that the security of Europe is a vital U.S. interest.

Certainly, American sacrifices in two world wars and the Cold War have proven our commitment to the region as a community of shared values, and those U.S. sacrifices have more than established our interest in recognizing and encouraging the rapid settlement of disputes in the area.

The U.S. and its NATO Allies have pursued a number of initiatives since the end of the Cold War to advance this strategy. These include negotiation and implementation of the 1990 Conventional Armed Forces in Europe Treaty (CFE),¹⁹ support for the unification of Germany, bilateral assistance to support reforms in former Soviet states, negotiation and ratification of the START II strategic arms control treaty, programs to dismantle nuclear stockpiles in Russia, the elimination of intermediate nuclear forces (INF), including a 90 percent overall reduction in NATO's nuclear weapons in Europe, and most importantly, active U.S. diplomacy and the deployment of American troops as part of a NATO-led force to help stop the war and secure the peace in the former Yugoslavia.

NATO plays an important role in this broader strategy for many of the same reasons that it played an essential role in maintaining peace and security in Europe during the past fifty years. NATO's success during this period went far beyond its accomplishments as an effective military mechanism for collective defense and deterrence. It also proved invaluable as a political institution in fostering continuing involvement of the United States and Canada in European security.

Adaptation of NATO's interest in broader European security to activity under the UN Charter's Chapter VIII began in 1990, soon after the fall of the Berlin Wall. In July 1990, under the active leadership of the Bush administration, NATO's London Summit Declaration set out new goals for the Alliance, called for changes in its strategy and military structure, and declared that the Alliance no longer considered Russia an adversary. These efforts were reaffirmed by the Alliance's declaration in Copenhagen in June 1991, which stated that NATO's objective was "to help create a Europe whole and free." At NATO's Rome Summit in November 1991, the Alliance adopted a new strategic concept, which reaffirmed the continuing importance of collective defense, while orienting NATO toward new security challenges, such as out-of-area missions, crisis management, and peacekeeping operations.

Since then, NATO has taken further steps to advance adaptation to a Chapter VIII role. At its January 1994 Summit in Brussels, the Alliance made two important decisions related to its status as a Regional Organization. First, it launched the Partnership for Peace (PFP) to enable intensive political and military-to-military cooperation with Europe's new democracies as well as

States which had considered themselves neutrals during the Cold War. PFP has proven to be an important and effective program for these States and for the Alliance: twenty-seven have joined PFP; a PFP Coordination Office has been established in Mons, Belgium; and thirty major PFP exercises have been held through June 1997, plus numerous exercises with Partners “in the spirit” of PFP. The program is proving its merit in Bosnia-Herzegovina, where thirteen PFP partner States are making substantial contributions to the NATO-led peace enforcement operation in the Balkans.

The second major initiative related to adaptation to Chapter VIII by NATO in Brussels in 1994 was the decision to embrace the concept of Combined Joint Task Forces (CJTF). This concept will enable both NATO forces and military assets to be employed in a more flexible manner to deal with peace enforcement obligations.²⁰

The benefits of a NATO doctrine that emphasizes flexible response as a Regional Organization are both immediate and long-term, and they accrue not only to existing and prospective NATO allies but to States who are outside the Alliance. Europe is a more secure and stable region because of NATO's commitment to work within Chapter VIII of the UN Charter. Even now, Central and East European States are reconstructing their foreign and defense policies to bring them in line with Alliance values and norms.

While there are many reasons for pursuing the values represented by NATO—i.e., democratic government, free markets, and security cooperation—a close analysis of recent events in Europe reveals that the NATO commitment to flexible response on the continent as a Regional Organization is also exerting a positive influence on States toward more peaceful relations. As an example, several recent agreements to ensure stable borders, promote inter-state cooperation, and address mutual concerns on the treatment of ethnic minorities have been signed. These include the Polish-Lithuanian Treaty of 1994, the Hungarian-Slovakian Treaty of 1996, a series of agreements in 1996 between Poland and Ukraine, the 1996 treaty between Hungary and Rumania, and the 1996 agreement between the Czech Republic and Germany concerning Sudetenland.

The NATO acceptance of Chapter VIII responsibilities has been most significant in Bosnia. NATO countries made a profound contribution to European security through their participation in the NATO-led Implementation Force (IFOR) and are still doing so under its successor Stabilization Force (SFOR), which is continuing to implement the military aspects of the Dayton Peace Accords. It is clear from these Bosnian missions that NATO members are already restructuring their forces so they can

participate in the full spectrum of current and new Alliance demands, including both Article V missions and peace enforcement missions.

One caution arises from our NATO experience in Bosnia, however. This relates to mission creep and the concern that military forces are being asked to perform tasks that are neither military in nature nor related to the agreed mission statement. During the first year of the IFOR mission, NATO commanders managed to restrict their responsibilities to separating the opposing factions, collecting heavy weapons, and supervising the exchange of territory. By early 1997, broader additional taskings were imposed which would have been better handled by international civilian agencies or Bosnian authorities. These included requests to help resettle refugees, set up elections, monitor local police, and sort out control of local broadcast stations. Pressure has likewise grown on the SFOR to assist in, if not spearhead, the arrest of dozens of war criminals.²¹

The U.S. understands that non-Article V NATO missions will only succeed if military personnel are limited to military tasks for which they have been trained. It is critical that NATO leaders carefully define force size, force structure, and mission as the SFOR proceeds. Allowing assignment of routine police functions to a military force will jeopardize many of the other obligations that the SFOR has assumed in Bosnia.

Observations and Conclusions

NATO acceptance of non-Article V missions is both necessary and contemplated by its Charter. With the end of the Cold War, there is a unique opportunity to build an improved security structure to provide increased stability in the Euro-Atlantic area without creating divisions among NATO members. The NATO alignment, with its history of military integration and cooperation brought about by years of successful planning and training for mutual defense responsibilities, is in the ideal position to participate effectively in peace enforcement activities requiring the exercise of "all necessary means" under Chapter VII of the UN Charter.

As noted earlier, peace enforcement operations, to be effective, require careful planning, experienced leadership, and highly integrated command and control arrangements. The current Bosnia operation reflects that NATO-led forces can meet these requirements as well as comply with the principles of force commitment embodied in PDD 25. The carefully developed response of leaders of the North Atlantic Alliance to the military requirements of the Dayton Peace Accords reflect the immense potential resident in NATO for

peace enforcement. The UN has recognized the need for regional leadership, and NATO has proven that it can successfully execute missions under UN authority, following rational requirements for troop deployment.

Notes

1. The North Atlantic Treaty Organization, comprised of sixteen member States and three new invitees (Poland, Hungary, and the Czech Republic, who are to be accorded membership in 1999), provides for collective defense in Article V of its Charter. Non-Article V missions authorized for consideration include peacekeeping and peace enforcement, now properly considered under Chapter VIII of the UN Charter.

2. Presidential Decision Directive (PDD) 25, May 4, 1994, "Reforming Multilateral Peace Operations," is a classified directive. An unclassified version has been published as Bureau of International Organizational Affairs, U.S. Department of State, Pub. No. 10161, The Clinton Administration Policy on Reforming Multilateral Peace Operations (1994).

3. See James P. Terry, *U.N. Peacekeeping and Military Reality*, 3 BROWN J. OF WORLD AFFAIRS 135, 136 (1996), for a review of UN inadequacies in peacekeeping and peace enforcement operations.

4. During NATO's Rome Summit in November 1991, at the urging of the Bush administration, the Alliance adopted a new strategic concept which reaffirmed the continuing importance of collective defense, while orienting NATO toward new security challenges, such as out-of-area missions, crisis management, and peacekeeping operations.

5. Chapter VI of the UN Charter includes Articles 32–38 and addresses "peaceful settlement of disputes." Although peacekeeping is nowhere mentioned in Chapter VI or elsewhere in the Charter, these articles (32–38) are interpreted to authorize the presence of an international interpositional force only after a peace agreement has been signed and the consent of the parties to the force presence and its mandate has been obtained.

6. Chapter VII of the UN Charter includes Articles 39–51 and addresses "breaches of the peace." Because sovereignty claims under Article 2 of the Charter are subordinate to the international interest in redressing aggression, Chapter VII authorizes "enforcement" actions to restore the peace and maintain the international "status quo," without the requirement to obtain the approval of the disputing parties.

7. Operations in Somalia included Operation RESTORE HOPE, authorized by the UN in S.C. Res. 794, U.N. SCOR, 47th Sess., 3145th mtg., U.N. Doc. S/RES/794 (1992), and UNOSOM II, authorized in S.C. Res. 814, U.N. SCOR, 48th Sess., 3185th mtg., U.N. Doc. S/RES/814 (1993). Operations in the former Yugoslavia included Operation DENY FLIGHT, authorized in S.C. Res. 816, U.N. SCOR, 48th Sess., 3919th mtg., U.N. Doc. S/RES/816 (1993), Operation PROVIDE PROMISE, authorized in S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/770 (1992), and Operation SHARP GUARD, authorized in S.C. Res. 781, U.N. SCOR, 47th Sess., 3122nd mtg., U.N. Doc. S/RES/781 (1992). Operations in Haiti included Operation UPHOLD DEMOCRACY, authorized in S.C. Res. 940, UN SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994), and UNMIH, authorized in S.C. Res. 964, U.N. SCOR, 49th Sess., 3470th mtg., U.N. Doc. S/RES/964 (1994).

8. The NATO-led Implementation Force (IFOR) implemented the military aspects of the 1995 Dayton Peace Accords in Bosnia and Herzegovina. It has now been succeeded by the NATO-led Stabilization Force (SFOR). While President Clinton earlier set June 1998 as the end-date for U.S. participation, in December 1997 he agreed to extend that date.

9. The Byrd Amendment, Sect. 8156 of the FY 94 Defense Appropriations Act, provided that any funds appropriated for DoD may be obligated for expenses incurred only through March 31, 1994, for “operations of United States Armed Forces in Somalia.” Department of Defense Appropriations Act of 1994, Pub. L. No. 103–139, § 8156, 107 Stat. 1418 (1993) (enacting the Byrd Amendment). The Kempthorne Amendment, Sect. 1002 to the FY 95 National Defense Authorization Act, although less onerous than the Byrd Amendment, restricted funding for U.S. military personnel on a “continuous” basis after September 30, 1994. National Defense Authorization Act of 1995, Pub. L. No. 103–337, § 1002, 108 Stat. 2663 (1994) (enacting the Kempthorne Amendment). See James P. Terry, *A Legal Review of US Military Involvement in Peacekeeping and Peace Enforcement Operations*, 42 NAVAL L. REV. 79 (1995), for a discussion of other legislation which would limit the President’s Article II authority to engage in peacekeeping. These include the Nunn-Mitchell Amendment to the FY 95 Defense Authorization Act, the Peace Powers Act, and the National Security Revitalization Act.

10. Secretary of Defense Caspar W. Weinberger articulated criteria for U.S. intervention before the National Press Club on October 28, 1984. Secretary Weinberger’s speech was printed verbatim in THE NEW YORK TIMES, Oct. 29, 1984, at A1, A4.

11. See discussion in James P. Terry, *The Evolving US Policy for Peace Operations*, 19 S. ILL. L. J. 119 (1994). Our formal efforts to improve UN peacekeeping were begun, even before the 1993 disaster, by former President George Bush. In a September 1992 speech to the UN, the then-President responded to the positive steps reflected in the Secretary General’s 1992 “Agenda for Peace” by committing the U.S. to work with the then-Undersecretary for Peacekeeping, Kofi Annan, to improve UN peacekeeping capabilities.

12. The Weinberger Criteria evolved from “lessons learned” from the Long Commission Report, largely written by Professor Grunawalt while serving as Commission Counsel, which documented the flawed U.S. actions leading to the 1983 Beirut bombing.

13. Chapter VIII, in Articles 52–54 of the UN Charter, specifically provides for “regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action. Article 53 provides, in pertinent part:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional agencies without the authorization of the Security Council.

14. See *An Agenda for Peace*, Report of the Secretary General, Jan. 31, 1992, U.N. Doc. A/47/277-S/24111. In paragraphs 60–65, Boutros-Boutros Ghali called upon regional organizations to do more. In his 1995 Supplement to *An Agenda for Peace*, Report of the Secretary General, Jan. 3, 1995, U.N. Doc. A/50/60–5/1995/1, the Secretary General specifically endorsed, in paragraph 79, the present NATO-led operation in Bosnia-Herzegovina.

15. Treaty of Washington (North Atlantic Treaty), 63 Stat. 2241, T.I.A.S. 1964 (entered into force August 24, 1949).

16. Article 5 of the Treaty of Washington provides, in pertinent part:

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

17. See Terry, *supra* note 9, at 84.

18. See discussion in BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 164–66 (4th ed. 1982).

19. This agreement alone has resulted in the elimination of more than 50,000 pieces of military equipment in Europe.

20. A third major initiative involves the invitation of additional European States to join NATO. While this NATO Enlargement Initiative is not directly related to Chapter VIII involvement by NATO in peace enforcement activities, the training and increased military-to-military relations that will accompany enlargement will complement NATO's increased capacity to perform as a regional organization.

21. In addition, several alleged Croat war criminals agreed to turn themselves in to SFOR officials in November 1997 in exchange for speedy trials. The U.S. has agreed to furnish investigators and military prosecutors to ensure compliance with the speedy trial guarantee. While not a part of the U.S. SFOR commitment directly, it reflects the type of military requirements we must be prepared to meet in peace enforcement operations.

XIV

Nuclear Weapons and the World Court: The ICJ's Advisory Opinion and Its Significance for U.S. Strategic Doctrine

Robert F. Turner

Introduction

BY THE NARROWEST OF VOTES (a 7 to 7 split on perhaps its most controversial conclusion), in fifteen opinions (including six dissents), totaling 270 pages, following eleven days of hearings during which twenty-five States testified and more than 30 submitted written materials,¹ the International Court of Justice (ICJ or World Court), on 8 July 1996, provided the United Nations General Assembly with a nonbinding advisory opinion² on the lawfulness of using, or threatening to use, nuclear weapons. In the process, it solemnly affirmed the obvious, obfuscated the serious, and on at least one important issue that was not even raised by the General Assembly's request almost certainly reached the wrong conclusion with decisive unanimity. In the

process, it may have inadvertently and gratuitously undermined the prospects for international peace and world order on the eve of the new millennium.

Perhaps not surprisingly, the opinion was quickly “interpreted” for the media by the “spin-doctors” representing such groups as the original “ban-the-bomb” Campaign for Nuclear Disarmament (CND),³ Greenpeace,⁴ and the International Association of Lawyers Against Nuclear Arms,⁵ as a decisive victory for opponents of nuclear weapons—ignoring the fact that their most vociferous defenders on the Court had issued strong dissenting opinions, while at the same time the opinion was generally welcomed by prominent U.S. Government lawyers⁶ as about as harmless a decision as anyone could have anticipated under the circumstances, especially given the opinion’s political genesis.⁷

Particularly revealing were the reactions of the Japanese mayors of Hiroshima and Nagasaki, who had made impassioned appeals to the Court to declare nuclear weapons illegal. Hiroshima Mayor Takashi Hiraoka told reporters that “the outcome looks as if to approve of the status quo,” and suggested that “the court is controlled by nuclear powers.”⁸ Nagasaki Mayor Itcho Ito expressed his “anger” at the World Court’s opinion, declaring to the press: “I felt enraged. . . .”⁹

In reality, despite some serious shortcomings, once properly understood, the core of the advisory opinion was consistent with well-established principles of international law and is largely to be welcomed. Nevertheless, because it will certainly continue to be cited in national and international policy debates in the coming years—and some generally reputable authorities have already clearly been misled¹⁰—it is important to understand what the Court did and did not say, and to identify a few clear shortcomings in the opinion.

There were initially two separate requests before the World Court for an advisory opinion on this issue, but the one brought by the World Health Organization was turned down by the Court because it was outside the lawful scope of the WHO’s responsibilities.¹¹ While the United States and several other countries urged the Court to use its discretion and reject the companion request from the General Assembly as well, the authority of the Assembly to seek such an opinion was obvious.¹²

The General Assembly had taken the position in nonbinding¹³ resolutions as early as 24 November 1961, that “the use of nuclear and thermo-nuclear weapons is . . . a direct violation of the Charter of the United Nations;”¹⁴ however, these were typically approved by narrow votes that were hardly indicative of a broad international consensus.¹⁵ Furthermore, even some of the General Assembly resolutions seemed to recognize that no legal rule had yet

been established outlawing nuclear weapons *per se*; for example, an ambiguous 1978 resolution asserted that “the use of nuclear weapons . . . *should* . . . be prohibited. . . .”¹⁶

Responding to an initiative launched by several anti-nuclear Non-Governmental Organizations (NGOs), on 15 December 1994, the UN General Assembly approved Resolution 49/75 K, which provided in part that the Assembly:

Decides, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: “Is the threat or use of nuclear weapons in any circumstances permitted under international law?”

The resolution was approved by a vote of 78 to 43, with 38 abstentions. Thus, only a plurality of those States voting registered support for such an advisory opinion; or, put differently, a slight majority of the organization did not approve the request. While the Charter seems to exclude abstentions in determining the outcome of a vote,¹⁷ the Court might certainly have considered this reality in deciding whether to respond positively to the request.

More significantly, an argument might be made that the resolution itself required a two-thirds majority to pass pursuant to the second paragraph of Article 18 of the Charter¹⁸—on the theory that urging the World Court to declare nuclear weapons *per se* illegal (the clear objective of the resolution) could have the potential to undermine the entire system of nuclear deterrence upon which international peace and stability have been premised for fifty years. Writing about the Court’s decision while still a New York University law professor, the current Deputy Legal Adviser to the United Nations argued that “it would not have been difficult to hold that a question relating to the threat or use of nuclear weapons” falls under the two-thirds majority requirement, but noted that “inexplicably no representative objected” on these grounds. Nevertheless, he concluded: “It would seem that the Court, in perhaps unseemly eagerness to address what is evidently one of the most interesting and important current legal questions, failed to consider the possibly most serious objection to its jurisdiction to do so.”¹⁹

Misstating the Question

There is a more fundamental problem with the General Assembly resolution: It was not phrased in the language of international law, and indeed

seemed calculated to *shift the burden of proof* from those who argued that nuclear weapons were unlawful to those who felt otherwise. The underlying premise of modern international relations is that sovereign States are coequal and generally independent of constraints except to the degree they consent to limitations on their freedom of action (normally in exchange for similar constraints on the conduct of other States), either through treaties and other international agreements or by a consistent practice that States recognize as reflecting a legal obligation. The burden thus falls upon those who claim a breach has occurred to identify the conventional or customary legal rule that limits the sovereign discretion of the State accused of the breach.

The classic statement of this principle was made by the Permanent Court of International Justice—the predecessor to the ICJ established under the League of Nations—in the landmark 1927 case of the S.S. *Lotus*:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed.*²⁰

This principle was reaffirmed by the ICJ as recently as the 1986 *Paramilitary Activities* case,²¹ and the improper wording of the 1994 resolution was objected to by several States in their written and oral presentations to the Court.²² The Court essentially ruled this harmless error,²³ while at the same time acknowledging: “State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibitions.”²⁴

However, it was clear from the declarations and opinions of the individual judges that accompanied the Court’s opinion that the *Lotus* principle is under assault by judges from the Third World who wish to see greater constraints placed upon States without having to obtain their consent. Thus, President Bedjaoui of Algeria contended in his Declaration that, while the *Lotus* case had “expressed the spirit of the times”:

It scarcely needs to be said that the fact of contemporary international society is much altered. . . . The resolutely positivist, voluntarist approach of international law which still held sway at the beginning of the century—and to which the Permanent Court also gave its support in the aforementioned [*Lotus*] judgment—has been replaced by an objective conception of international law, a

law more readily seen as the reflection of a collective juridical conscience and as a response to the social necessities of States organized as a community.²⁵

Restricting the Right of Self-Defense

The real question before the Court was actually far narrower than might at first appear from a reading of the General Assembly's Resolution, as it was universally agreed that possession of nuclear weapons did not confer some sort of immunity from the prohibition against the aggressive use of force embodied in the UN Charter.²⁶ Thus, the only *real* question to be addressed was not whether the threat or use of nuclear weapons was ever lawful, but whether international law prohibited a State in possession of nuclear weapons from using them, or threatening to use them, under any conceivable circumstances in a defensive response to armed international aggression.²⁷

Indeed, since deterrence itself is premised upon an implied "threat" to use whatever existing weapons may be necessary and otherwise lawful in the event of aggression, the ICJ was essentially being asked to *outlaw* the most powerful instrument in international relations for the dissuasion of aggression and the promotion of peace.²⁸ The Court does not appear to have focused on this reality, although it was at least implicit in the statements of some of the States who provided comments.²⁹ One of the most compelling reasons for the Court to have exercised its discretion³⁰ and not issued the requested opinion—in addition to the fact that a majority of the General Assembly had not supported the request, and several States had warned that such an opinion might undermine diplomatic negotiations—was that the most likely consequence of even hinting that nuclear weapons were *per se* unlawful might well be to undermine the policy of nuclear deterrence that has worked so well for half-a-century in keeping the world out of World War III. This point will be addressed *infra*.³¹

The Proper Legal Standard

The proper role of the International Court of Justice is not to decide what result a majority of judges believe to be good public policy or "fair" or "just,"³² or to divine legal rules from deep meditation, but to determine whether the presumptive right of sovereign States to pursue their perceived interests in a specific manner has been limited by an established rule of international law. As the Court acknowledged: "It is clear that the Court cannot legislate. . . ."³³

Article 38 of the Statute of the ICJ sets forth the sources of international law the Court may use in deciding whether conduct has been prohibited:

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Ascertaining the Relevant Law

Thus, the role of the Court was to examine each of these sources of law to ascertain whether, and if so to what extent, they might limit the threat or use of nuclear weapons and then to inquire whether there were any conceivable defensive settings in which the threat or use of a nuclear weapon might not be in conflict with any such legal rules. The basic inquiry was whether international law included a *per se* prohibition against every threat or use of nuclear weapons and that the proper test was not the “worst case” setting of a massive aggressive assault involving the delivery of thousands of large nuclear devices against another State’s cities, but rather the “best case”—such as a use of a nuclear weapon on the High Seas to destroy an enemy warship preparing to launch weapons of mass destruction against the civilian population of the State seeking to defend itself.³⁴

International Conventions. Quite correctly, no State contended before the Court that nuclear weapons were free from constraints under international law. On the contrary, the nuclear powers readily conceded that any threat or use of such weapons must comply with the *jus ad bellum* governing the initiation of hostilities and the *jus in bello* regulating the conduct of military operations—some provisions of which were embodied in treaties and others in customary law.³⁵

For example, it was universally acknowledged that the UN Charter limited any threat or use of nuclear (or any other) weapons to acts of individual or

collective self-defense or when authorized by the UN Security Council.³⁶ Similarly, it was accepted without dissent that the laws of armed conflict—prohibiting such behavior as attacks on noncombatants, the infliction of unnecessary suffering, and the use of weapons that are incapable of discriminating between combatants and noncombatants—are applicable to nuclear weapons.³⁷

The Court is to be commended for rejecting a variety of assertions by opponents of nuclear weapons, such as that Article 6 of the International Covenant on Civil and Political Rights (guaranteeing the “inherent right to life”) outlawed the defensive use of nuclear weapons in combat (a contrary holding would presumably have outlawed all lethal weapons).³⁸ It also rejected claims that a variety of environmental treaties implicitly outlawed nuclear weapons,³⁹ that various treaties prohibiting “poisonous weapons” applied to nuclear weapons,⁴⁰ or that any use of nuclear weapons would constitute genocide.⁴¹

The States which denied the existence of a *per se* prohibition on nuclear weapons recognized that there were a variety of treaties and international agreements imposing legal limits on nuclear weapons, ranging from bilateral arms control agreements negotiated by the United States and the former Soviet Union to multilateral treaties prohibiting the emplacement of nuclear weapons in outer space, on the seabed or ocean floor, and in several geographic “nuclear-free” zones.⁴²

After a lengthy discussion, the Court concluded that while the growing number of treaties limiting nuclear weapons might be seen as “foreshadowing a future general prohibition on the use of such weapons, . . . they do not constitute such a prohibition by themselves.”⁴³ In this connection, the Court noted that under several of these treaties “the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances,” and “these reservations met with no objection from the [other treaty] parties . . . or from the Security Council.”⁴⁴

International Custom. As already noted, historically, and as a general principle today, States are only obligated to abide by legal rules to which they have individually consented—either by entering into treaties or other international agreements intended to be binding under international law, or by joining in a widespread practice with other States out of the belief (*opinio juris*) that it is an obligation of international law. The provisions of treaties do not normally constrain States which have not consented to be so bound, and a State which

persistently registers its objection to an emerging rule of customary international law is normally not bound by that rule.

However, there is an exception to the general principle that a State must consent to be bound by a legal rule. Since the Court's *Statute* was written, a consensus has emerged that certain "peremptory norms" of international law are of such fundamental importance that they will be imposed even upon persistent objectors despite their lack of consent. Often identified by the Latin expression *jus cogens*, these principles have been so universally embraced through all major legal systems, and the consequences of their breach are viewed as so objectionable, that the collective world community basically agreed to impose them on all States. Classic examples include the prohibition embodied in Article 2(4) of the UN Charter prohibiting the aggressive use of military force, the prohibition against certain categories of large-scale murder contained in the Genocide Convention, and the prohibitions against piracy and the slave trade.

The Court acknowledged the existence of such "intransgressible principles of international customary law"⁴⁵ in the *Nuclear Weapons* case, but such norms were not critical to the decision. The standard for constituting a preemptory norm of international law is considerably higher than that for normal rules of customary law, and there are no *jus cogens* rules that are not clearly also customary law. Once having found that there were no rules of customary law prohibiting every threat or use of nuclear weapons,⁴⁶ it was unnecessary for the Court to ask whether these norms had achieved preemptory status.

To be sure, no country has actually used a nuclear weapon in hostilities since 1945; but the Court rejected assertions that this was evidence of customary law because of the clear absence of an *opinio juris*.⁴⁷ Another contention that was rejected was that a series of UN General Assembly resolutions should be accepted as evidence of a customary rule. While the General Assembly has no general "lawmaking" authority,⁴⁸ its resolutions can, when overwhelmingly supported by member States, serve as evidence of the existence of an *opinio juris*. However, as the Court observed, the antinuclear resolutions often provided that nuclear weapons "*should be prohibited*," and they were "adopted with substantial numbers of negative votes and abstentions," leading the Court to conclude: "although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons."⁴⁹

General Principles of Law, National Judicial Decisions, and Scholarly Writings. The basic nature of the issue before the Court precluded serious

recourse to “general principles of law recognized by civilized nations,” as the question of threatening or using nuclear weapons is inherently international in character.⁵⁰ While the Court did note that it was “not called upon to deal with an internal use of nuclear weapons,”⁵¹ it is obvious that “civilized nations” have not formulated special “principles of law” governing the domestic use of nuclear weapons. Similarly, there was little recourse to such “subsidiary means” for determining legal rules as national judicial opinions and scholarly treatises.⁵²

The *Dispositif*

The *Dispositif*, or operative provisions, of the *Nuclear Weapons* case consisted of six conclusions in paragraph 105 of the opinion, half of which were little more than what the Court’s Vice President (and current President) acknowledged to be “anodyne asseveration[s] of the obvious. . . .”⁵³ Thus, no State has ever contended that there was any “specific authorization of the threat or use of nuclear weapons” in customary or conventional international law,⁵⁴ and including a sentence on this point made little legal sense other than as a political concession to the framers of the General Assembly Resolution who had couched their request in such terms.

Similarly, deciding that “a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful,”⁵⁵ is obviously tautological—akin to solemnly declaring that “an act prohibited by international law is unlawful.” Again, the inclusion of such an obvious and unquestioned conclusion presumably can be explained as a concession either to the supporters of the General Assembly Resolution or to the Court dissenters who had wished to declare a *per se* prohibition.

Of an essentially similar nature is the Court’s unanimous conclusion that:

A threat or use of force by means of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons. . . .⁵⁶

Again, the nuclear-weapons States had conceded all of these points,⁵⁷ which have to this writer’s knowledge never been seriously in dispute. Such obvious conclusions hardly justified the time and money invested in the process by the General Assembly, the Court, or the member States.

Turning to more controversial matters, by a still decisive vote of eleven-to-three, the Court decided:

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. . . .⁵⁸

This was perhaps the most important part of the decision, both because of the Court's nearly four-to-one majority on the issue and because it answered the basic legal questions implicit in the General Assembly's request.

To be sure, the Assembly had actually asked whether there were any circumstances in which the threat or use of nuclear weapons was *permitted* under international law, but the Court quite properly had rephrased the answer to be consistent with the reality that international law permits that which is not prohibited.⁵⁹ Indeed, had the Court limited its reply to this sentence—perhaps accompanied by language noting that the lawfulness of any use of a nuclear weapon, like all other weapons not prohibited *per se* by international law, must be determined in the context of both *why* and *how* they are threatened or used—it would have been an excellent opinion.

Perhaps the most controversial of the Court's conclusions reads:

It follows from the above-mentioned requirements [of the international law of armed conflict] that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. . . .⁶⁰

Perhaps the first observation that should be made about this part of the Court's *Dispositif* is that it was not initially reached by the majority vote normally required by the Court's *Statute*.⁶¹ Judge Andres Aguilar Mawdsley, of Venezuela, died in October 1995, a month before the case was argued—leaving a Court of only fourteen members, who divided evenly, seven-to-seven, on this conclusion. Since in contentious cases it is highly undesirable for tribunals to be unable to reach a decision, the Court's *Statute* provides:

In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.⁶²

Because of the application of this rule, President Bedjaoui of Algeria—who in his separate Declaration characterized nuclear weapons as “the ultimate evil”⁶³—was permitted to cast a second vote, bringing the official count on this provision to eight-to-seven. One might note that this outcome was totally a coincidence of timing, for had the vote occurred less than a year later, after the distinguished American jurist Steven Schwebel was elected President of the Court, a different opinion would presumably have resulted.

As an aside, one might argue that the Court has the discretion to withhold the “casting vote” procedure in advisory opinions. The considerations which encourage the definitive resolution of contentious disputes between or among States are not so clearly applicable in the case of a request for an advisory opinion. The *Statute* gives the Court discretion to decide which of its procedural rules are “applicable” to an advisory opinion,⁶⁴ and it would have been consistent with the *Statute*⁶⁵ and fully responsive to the General Assembly to reply that:

- (1) International law does not prohibit the threat or use of nuclear weapons *per se*;
- (2) Like all weapons, the threat or use of nuclear weapons must comply with existing *jus ad bellum* and *jus in bello*,
- (3) Based upon the Court’s understanding⁶⁶ of the nature of such weapons, their use would only be lawful in an exceptional setting; and
- (4) In the absence of more detailed information about the characteristics of the weapon in question, its intended target, the purpose for which the threat or use of nuclear weapons is made, and many other circumstances, the Court is unable to provide more specific meaningful advice that would be applicable to every situation.

In any event, the weight to be accorded the Court’s nonbinding “advice” to the General Assembly on this point ought to be evaluated in the context of the evenly split vote that produced it; and the “casting vote” procedure should be recognized as the jurisprudential equivalent of a coin toss.

However, having said that, one might also note that, under the circumstances, the basic conclusion is not all that remarkable. Essentially, the Court is saying that by the narrowest of possible margins it has decided that it cannot decide whether the threat or use of nuclear weapons would be lawful, even “in an extreme circumstance”; and, given the horrific consequences commonly associated with any use of nuclear weapons, such a cautious

conclusion is not all that surprising—particularly in the absence of a concrete case or detailed information about the characteristics of modern (or future generations of) nuclear weapons.

Indeed, had the Court merely reported that it “cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence,” omitting the further qualifying language “in which the very survival of a State would be at stake,” this writer would probably have found that reasonable and acceptable. Given the stakes involved, speculative conclusions in the absence of necessary facts probably serve little purpose.

One certainly can embrace the Court’s recognition that international humanitarian law would preclude the use of nuclear weapons in other than “extreme circumstances,” but to conclude further than such circumstances would necessarily have to involve “a threat to the survival of a State” is unwarranted by any established or identified legal rule. As shall presently be demonstrated, there are easily conceivable settings in which a State might have no effective alternative to *using* a nuclear weapon to neutralize a threat to the lives of millions of its civilians, even though the State might nevertheless continue to exist if it elected to endure such a sacrifice. And if there is any principle of international humanitarian law that precludes even a *threat* to use nuclear weapons as a means of deterring illegal international aggression involving the use of unlawful weapons of mass destruction, the Court has failed to identify it. Indeed, any rule that would prohibit a State in lawful possession of nuclear weapons from even *threatening* to use them defensively to preserve the lives of tens of millions of innocent noncombatants would stand as clear evidence that law had become part of the problem—or, in the words of Dickens: “If the law supposes that, the law is a ass, a idiot.”⁶⁷

Dangerous Ambiguity: The World Court and the Use of Nuclear Weapons in Defense of Third States

The Court does not in the *Dispositif* clarify whether a distinction exists between threatening or using nuclear weapons in response to “extreme circumstances of self-defense” threatening the survival of the nuclear-weapons State *itself*, and a threat by such a State to use nuclear weapons in collective defense against a threat to the survival of a third State; however, elsewhere in the opinion there is a reference to a State using nuclear weapons “in an extreme circumstance of self-defence, in which *its* very survival would be at stake.”⁶⁸ This is an alarming statement, and it is contrary to the spirit of the

United Nations Charter, which expressly recognizes “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”⁶⁹ Senator Arthur Vandenberg, who chaired the subcommittee of Commission III at San Francisco that actually drafted Article 51, explained to his Senate colleagues in 1949:

To make a long story short, Latin-America rebelled—and so did we. If the omission [of the right of collective self-defense] had not been rectified there would have been no Charter. It was rectified, finally, after infinite travail, by agreement upon article 51 of the Charter. Nothing in the Charter is of greater immediate importance and nothing in the Charter is of equal potential importance.⁷⁰

Similarly, in explaining this provision to the Senate Foreign Relations Committee in July 1945, John Foster Dulles affirmed:

At San Francisco, one of the things which we stood for most stoutly, and which we achieved with the greatest difficulty, was a recognition of the fact that that doctrine of self-defense, enlarged at Chapultepec to be a doctrine of collective self-defense, could stand unimpaired and could function without the approval of the Security Council.⁷¹

There is a strong argument that the right of sovereign States to use necessary and proportional lethal force in defense against armed international aggression is not only “inherent,” as the English-language text of Article 51 terms it, but also “imprescriptable” (as the Russian text of Article 51 asserts⁷²) or “inalienable” (as the United States argued in 1928⁷³). In his separate opinion, Judge Fleischhauer (Germany) argued that the Court could also have found legal support for this right in “the general principles of law recognized in all legal systems,” as it is universally recognized “that no legal system is entitled to demand the self-abandonment, the suicide, of one of its subjects.”⁷⁴ This view was also embraced by President Bedjaoui, who acknowledged that “[a] State’s right to survival is . . . a fundamental law, similar in many respects to a ‘natural’ law.”⁷⁵ It is certainly not a right to be narrowed by judicial *fiat* of the World Court, and anyone asserting that a victim of aggression may not defend itself by the use of lawful weapons, against lawful targets, in compliance with the law of armed conflict—or may not obtain voluntary assistance from other peaceloving States in meeting the aggression collectively—has the burden of identifying the legal basis for such a rule in conventional or customary international law. The principle of acting *collectively* to meet threats to the peace is not only unimpaired by the Charter, it is the very first objective

embodied in the Charter⁷⁶; and simple declarations, unsupported by compelling legal authority, asserting or implying such limitations, are insufficient—even when they emanate from the World Court. As the Court has acknowledged, it “cannot legislate,”⁷⁷ yet a careful reading of their opinions suggests that “legislate” is exactly what some of the judges attempted to do.⁷⁸

Few legal doctrines have been more critical in deterring aggression and promoting peace than the recognized right of relatively weak victims of aggression to call upon other peaceloving members of the world community for assistance in the event they are victims of armed international aggression; and why the World Court seems determined to undermine this important Charter principle is unclear.⁷⁹ In essence, the World Court seems to be announcing that States that can acquire weapons of mass destruction and do not respect the rule of law will be free to use them at will against weaker peaceloving States that lack such weapons—because the nuclear-weapons States will be prohibited by international law from responding (or even *threatening* to respond) in kind to even the most flagrant criminal acts of aggression.⁸⁰ This point is of more than academic importance, because one of the incentives in the Nuclear Non-Proliferation Treaty (NPT)⁸¹ to encourage States to forego their right to develop nuclear weapons was a promise, endorsed by the Security Council, that the nuclear-weapon States would come to their defense in the event they were threatened with nuclear weapons.⁸² As Judge Oda (Japan) said in the conclusion of his dissenting opinion in the case:

One can conclude from the above that, on the one hand, the NPT régime which presupposes the possession of nuclear weapons by the five nuclear-weapon States has been firmly established and that, on the other, they have themselves given security assurances to the non-nuclear weapon States by certain statements they have made in the Security Council. . . . It is generally accepted that this NPT régime is a necessary evil in the context of international security, where the doctrine of nuclear deterrence continues to be meaningful and valid.⁸³

Pactum de Contrahendo or Pactum de Negotiando?

The final paragraph of the *Dispositif* was also reached by unanimous decision:

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.⁸⁴

This part of the opinion may warrant more consideration than it has thus far received. While the General Assembly's request for an advisory opinion was clearly politically motivated and poorly phrased, the question focused entirely upon the existing legal status of the threat or use of nuclear weapons, and did not even suggest that advice was being sought on obligations to negotiate new limitations.⁸⁵ Nevertheless, the Court *sua sponte* elected to address this issue—presumably as another consolation to States that had hoped or expected a decision that nuclear weapons are unlawful *per se*.

Not surprisingly, this *dicta* did not escape the attention of the General Assembly, which in December 1996 approved a resolution thanking the Court, "taking note" of the opinion, and then resolving that the General Assembly:

3. *Underlines* the unanimous conclusion of the Court that there exists an obligation to pursue in good faith *and bring to a conclusion* negotiations leading to nuclear disarmament in all its aspects under strict and effective international control;
4. *Calls upon* all States to fulfill that obligation immediately by commencing multilateral negotiations in 1997 *leading to an early conclusion* of a nuclear-weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.⁸⁶

Because *dicta* from the ICJ advisory opinion is being used to argue that a legal duty now exists to reach agreement on these issues, it is important to look more carefully at this part of the Court's opinion and at the legal theories upon which it is premised.

By way of background, paragraph F of the *Dispositif* was premised upon Article VI of the Nuclear Nonproliferation Treaty, which provides:

Article VI

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.⁸⁷

In paragraphs 99 and 100 of its advisory opinion, the Court quotes this provision and then provides this conclusion:

The legal importance of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise

result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith. . . . This twofold obligation to *pursue* and to *conclude* negotiations formally concerns the 182 States parties to the Treaty . . . or, in other words, the vast majority of the international community.⁸⁸

Despite the unanimous vote on paragraph F of the *Dispositif*, the Court seems clearly to have confused two related legal concepts: an agreement to conclude a specific agreement in the future (*pactum de contrahendo*) and an agreement to negotiate in good faith in the future in an effort to reach agreement on a specified issue (*pactum de negotiando*). In this case, the Court's conclusion is simply not reconcilable with the text or *travaux* of the agreement. It is submitted that Article VI of the NPT does not, and *cannot reasonably be interpreted to*,⁸⁹ obligate treaty parties to *conclude* anything—the obligation is clearly only to “pursue negotiations in good faith” towards that end.

The basic principles for interpreting international agreements are set forth in the Vienna Convention on the Law of Treaties,⁹⁰ which, while not binding as conventional law on all parties to the NPT, are widely recognized as reflecting customary international law. Under the heading “General rule of interpretation,” the Convention provides, *inter alia*:

Article 31

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The “ordinary meaning” of a promise to “pursue negotiations” is not “to reach an agreement”—which, if it has any meaning, presumably would require States to accept the best terms the other side was willing to offer.⁹¹ To be sure, the same obligation would exist for the second State—or in this instance for all of the 185 parties to the treaty. Does this mean that the first State to get to the World Court can obtain a judgment requiring all of the other treaty parties to “conclude” the treaty favored by the petitioning State? Since the so-called “obligation to . . . conclude negotiations” is not simply for a disarmament treaty, but one incorporating “strict and effective international control,” is it the proper role of the Court to consider the first proposal brought before it, and if in the Court's wisdom that proposal includes such control, to compel every other treaty party to adhere to those terms? Or does the Court instead intend to assume the legislative task of drafting perhaps hundreds of pages of highly

detailed and intrusive inspection and verification terms, to be imposed upon sovereign States irrespective of their consent?

What, pray tell, is the Court then to do with the States that are *not* parties to the NPT and thus have clearly not consented to this alleged “obligation . . . to conclude negotiations?” Having declared that all treaty parties must enter into “a treaty on general and complete disarmament under strict and effective international control,” what is the Court then to do about the small number of non-parties to the treaty who do not elect either to surrender all of their weapons or to submit to the controls the Court seeks to impose upon treaty parties? Are they to be rewarded by being allowed to remain outside the disarmament regime—presumably expanding their arsenals (at “going-out-of-business” discount prices) as their neighbors are compelled by the Court to rid their territory of all weapons—or will the Court anoint the first “acceptable” draft treaty submitted to it by any treaty party as establishing a *jus cogens* obligation *erga omnes*?

Perhaps the most interesting practical question raised by such an approach is how long the NPT would continue to exist before one State after another invoked its right under Article X to withdraw from the treaty—citing the out-of-control World Court as the “extraordinary event” that has “jeopardized the supreme interests of its country?”⁹² Surely world peace and the rule of law would not be furthered by such an obvious misinterpretation of the NPT.

Fortunately, the NPT is safe, because the World Court clearly reached the wrong conclusion in this nonbinding advisory opinion. The issue raised by Article VI of the NPT is not one of first impression in international law. Even when the language of an agreement clearly provides that the parties will not just negotiate but *conclude* a future agreement, unless the terms are essentially fixed by reference to the original agreement, tribunals tend to treat them as nothing more than a commitment to negotiate in good faith. Thus, in the 1925 *Tacna Arica Award* (*Chile v. Peru*)—which involved an agreement to conclude a future protocol to prescribe “the manner in which the plebiscite is to be carried out, and the terms and time for the payment by the nation which remains the owner of the provinces of Tacna and Arica”⁹³—the arbitrator found:

As the Parties agreed to enter into a special protocol, but did not fix its terms, *their undertaking was in substance to negotiate in good faith to that end. . . .* Neither Party waived the right to propose conditions which it deemed to be reasonable and appropriate to the holding of the plebiscite, or to oppose conditions proposed by the other Party which it deemed inadvisable. *The agreement to make a special protocol with undefined terms did not mean that either Party was bound to make an*

agreement unsatisfactory to itself provided it did not act in bad faith. Further, as the special protocol was to be made by sovereign States, it must also be deemed to be implied in the agreement . . . that these States should act respectively in accordance with their constitutional methods, and bad faith is not to be predicated upon the refusal of ratification of a particular proposed protocol deemed by the ratifying authority to be unsatisfactory.⁹⁴

In 1931, the predecessor to the current World Court—the Permanent Court of International Justice (PCIJ)—issued an Advisory Opinion on *Railway Traffic between Lithuania and Poland*⁹⁵ at the request of the League of Nations. Summarized briefly, in an effort to resolve a quarrel between the two countries, the Council of the League of Nations had approved a resolution recommending “the two Governments to enter into direct negotiations as soon as possible in order to establish such relations between the two neighbouring States [as] will ensure ‘the good understanding between nations upon which peace depends’”⁹⁶ This resolution was accepted by both countries, and Poland subsequently contended that Lithuania was obligated to agree to reopen a section of railway between Vilna and Livau that had been destroyed during World War I.

The PCIJ concluded that both States were legally bound by the “agreement to negotiate” contained in the Council’s resolution, but rejected the Polish view that this was in reality a legal obligation “not only to negotiate but also to come to an agreement,” explaining:

The Court is indeed justified in considering that the engagement incumbent on the two Governments in conformity with the Council’s Resolution is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements. . . . But an obligation to negotiate does not imply an obligation to reach an agreement. . . .⁹⁷

In 1950 the newly established International Court of Justice was asked for an advisory opinion on whether South Africa had a legal duty to negotiate a trusteeship agreement to place the former German colony of South-West Africa—which had been placed under South African control by a League of Nations mandate following World War I—under the new UN trusteeship system.⁹⁸ While the Court majority found no such obligation, in his dissent, Judge Alvarez found not only a duty to negotiate but also an “obligation” to reach an agreement. However, he acknowledged: “even admitting that there is no *legal* obligation to conclude an agreement, there is, at least, a political obligation. . . .”⁹⁹

Consider as well a 1972 arbitral award by a tribunal established to resolve disputes between Greece and Germany resulting from World War II. The tribunal was asked to decide whether an undertaking to engage in “further discussions” and “negotiations” included an obligation to reach an actual agreement. The tribunal held;

With the ratification of the Agreement, the parties . . . undertook to negotiate their dispute anew notwithstanding the earlier refusals of both sides to retreat from positions that had hardened over the years. Article 19 must be considered as a *pactum de negotiando*. The arrangement arrived at between the parties in the present case is not a *pactum de contrahendo* as we understand it. This term should be reserved to those cases in which the parties have already undertaken a legal obligation to conclude an agreement. . . .¹⁰⁰

The tribunal went on to note that even a *pactum de negotiando* creates legal obligations for the parties:

However, a *pactum de negotiando* is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way.¹⁰¹

An article published in the highly acclaimed *Encyclopedia of Public International Law* in 1997 on these two types of agreements concluded that *neither* contains an enforceable legal obligation to do more than negotiate in good faith:

In the author's view there is no relevant distinction between the two *pacta* in the legal quality of the obligations resulting from these instruments. There is no case where an absolute “agreement to agree” has been recognized by an international tribunal. Therefore, the contractual obligations to negotiate in good faith with a view to concluding a subsequent agreement, laid down in *pactum*—be it named *pactum de contrahendo* or *pactum de negotiando*—will only differ slightly according to the circumstances in the particular case: the margin of negotiation on matters of substance left open to the parties for shaping the ultimate agreement will be larger or smaller according to the degree to which the substantive contents of the final agreement can be determined by means of the *pactum* itself.¹⁰²

International and National Treatises. If one were to examine “judicial decisions and the teachings of the most highly qualified publicists of the various

nations,”¹⁰³ one would find similar conclusions. One of the world’s foremost authorities on treaty law was Lord Arnold Duncan McNair, who during his distinguished career served as president of both the International Court of Justice and the European Court of Human Rights. He provides this discussion in his classic 1961 treatise, *The Law of Treaties*:

Pactum de contrahendo

This term is correctly applied to an agreement by a State to conclude a later and final agreement, and these preliminary agreements are of frequent occurrence. . . . When they are expressed *with sufficient precision*, they create valid obligations. . . .

It is, however, necessary to distinguish between a true obligation to enter into a later treaty and an obligation merely to embark upon negotiations for a later treaty and to carry them on in good faith and with a genuine desire for their success.

Less happily in our opinion, the term *pactum de contrahendo* is applied to an obligation assumed by two or more parties to *negotiate* in the future with a view to the conclusion of a treaty. This is a valid obligation upon the parties to negotiate in good faith, and a refusal to do so amounts to a breach of the obligation. But the *obligation is not the same as an obligation to conclude a treaty* or to accede to an existing or future treaty, and the application to it of the label *pactum de contrahendo* can be misleading and should be avoided.¹⁰⁴

Turning to United States law, Professor Allan Farnsworth served as Reporter to the *Second Restatement of Contracts*, and his multivolume treatise, *Farnsworth on Contracts*, is among the leading texts on the issue in the United States. He discusses a variety of judicial opinions refusing to enforce agreements to agree on the grounds that they were “vague and indefinite,” and under the heading “Agreements to Negotiate” writes:

Under an agreement to negotiate, the parties negotiate with the knowledge that if they fail to reach ultimate agreement they will not be bound. The parties to an agreement to negotiate do, however, undertake a general obligation of fair dealings in their negotiations. . . . [H]ere there is no way of knowing what the terms of the ultimate agreement would have been, or even whether the parties would have arrived at an ultimate agreement Because of the uncertain scope of an undertaking to negotiate, a court cannot be expected to order its specific performance, though it might enjoin a party that had undertaken to negotiate exclusively from negotiating with others.¹⁰⁵

Professor Farnsworth notes that English courts have been “adamant” on this issue, quoting “a distinguished English judge” as having “condemned an

agreement 'to negotiate fair and reasonable contract sums' " by saying: "If the law does not recognise a contract to enter into a contract (where there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate."¹⁰⁶

The Travaux Préparatoire. If there is any remaining doubt about whether Article VI of the NPT is an agreement to conclude a future agreement, it is useful to return to the Vienna Convention on the Law of Treaties:

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory works of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.¹⁰⁷

While it is difficult to contend that the language of Article VI is ambiguous or obscure—or otherwise meets the test for resorting to supplementary means of interpretation—it is nevertheless useful to consult the *travaux préparatoires* to confirm that the unanimous World Court reached the wrong result. The standard reference on the NPT is Mohamed I. Shaker's multivolume study, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959–1979*, which provides useful background on Article VI.

Dr. Shaker notes that the original drafts included merely preambulatory references to the importance of ending the nuclear arms race and achieving disarmament, and notes that "the two super-Powers preferred a simple treaty without linking it with any other arms control and disarmament measures. . . ." ¹⁰⁸ India, however, "advocated that a non-proliferation treaty must embody an article of solemn obligation under which nuclear-weapon States *would negotiate* a meaningful programme of reduction of existing stockpiles of weapons and their delivery vehicles. . . . The obligation was therefore not merely *to negotiate* a meaningful programme but *to undertake* certain measures."¹⁰⁹ Similarly, Romania proposed that "(t)he nuclear weapon States Parties to this Treaty undertake to adopt specific measures. . . ." ¹¹⁰ However, as Dr. Shaker observes:

[I]t was realised that it would not have been accepted by both the Soviet Union and the United States. Moreover, it was pointed out that *it would have hardly been*

feasible in legal terms to enter into obligations to arrive at agreements. The least [sic] that could be done, therefore, was to introduce in the NPT an obligation “to pursue negotiations in good faith” as proposed by Mexico, or “to negotiate” as proposed by Brazil. . . . The Mexican formula was the one adopted by the two co-Chairmen in their identical treaty drafts of 18 January 1968.¹¹¹

Lest there be any doubt about the obligation that resulted, Dr. Shaker notes:

Under the pressure of the non-aligned States as well as from some of their own allies, the two super-Powers merely accepted in the NPT to undertake to pursue negotiations in good faith, but *not*, as pointed out by one American negotiator, “to achieve any disarmament agreement, since it is obviously impossible to predict the exact nature and results of such negotiations.”¹¹²

It is thus clear from the text, the *travaux*, and the underlying legal principles involved, that Article VI of the NPT constitutes only a *pactum de negotiando*—an obligation to negotiate in good faith towards the specified end—and, despite the unanimous character of the *Nuclear Weapons* advisory opinion on this point to the contrary, it does not constitute a *pactum de contrahendo*. Indeed, the very language of the agreement—with references to “effective measures” and “strict and effective international control”—explains why this was but an undertaking “to pursue negotiations in good faith” on the subject.

It might be added that if, despite the clear language to the contrary, this was a *pactum de contrahendo*, the terms of this agreement would presumably need to be objectively ascertainable with reasonable clarity. Unless the Court is prepared to spell out the precise terms of a “treaty on general and complete disarmament under strict and effective international control,” including identifying when, where, by whom, and under what conditions the highly intrusive international verification inspections are to occur—so that it will be possible to identify which States are in breach for failing to anticipate and accept those terms—it is difficult to take this portion of the Court’s decision very seriously. It is mere *brutum fulmen*.

It is evident that the Court cannot flush out even basic terms for any such agreement, because no such agreement ever existed in the minds of the parties when they entered into the treaty. Presumably, they all shared a vision that someday the world might live at peace without war, and some may well have had in mind specific provisions they intended to try to insert in any convention promoting this end. But the convention *travaux* provide no suggestion that anything approaching final treaty terms was ever discussed as the NPT was drafted.

Equally clearly, one can be confident that few countries would have ratified the NPT with the expectation that the World Court might subsequently declare them in breach of an obligation to ratify a subsequent treaty containing highly intrusive but unknowable verification and inspection provisions—not to mention to surrender *all* of their arms—and premise their security upon the Court imposing a verifiable and effective machinery to prevent all possible violations of this unknown future convention. Put simply, Article VI of the NPT creates nothing more than an obligation to negotiate in good faith; and the Court's 1996 advisory opinion cannot change that.

A Legal Use of Nuclear Weapons: The Missing Hypothetical

The World Court is, in the view of the present writer, clearly mistaken in its conclusion that the only conceivable lawful use of nuclear weapons would involve a threat to the survival of a State, but the fault may not be entirely that of the judges. Much of the public debate on this issue has been fueled by scholarship and government studies, dating from the 1950s and 1960s, on the destructive nature of nuclear weapons, and the nuclear-weapons States have understandably surrounded their more recent weapon-development programs in a shroud of secrecy.

One would have thought, given the importance of the issue and the widespread reports of the existence of a new generation of low-yield, highly accurate nuclear weapons, that at least one of the nuclear powers would have set forth at least one hypothetical that the Court could use in its legal analysis phase—applying the law to specific facts—but other than a few vague references to “High Seas,” “submarines,” and “deserts,”¹¹³ this does not appear to have been done.

Candidly, even these brief references should have given the Court sufficient insight to envision some possible uses of nuclear weapons that would not necessarily conflict with existing laws—a single example would have permitted a conclusion that under certain conceivable circumstances the threat or use of nuclear weapons may be lawful. The ICJ *Statute* provides that in its advisory functions the Court shall be “guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable,”¹¹⁴ and those provisions provide a plethora of fact-finding instruments. Unlike the situation in American courts, where the absence of a party permits the tribunal to accept the facts as properly pleaded by the other party, the World Court must before rendering a decision in the absence of a party “satisfy itself . . . that the claim is well founded in fact and law.”¹¹⁵ It may

also call upon parties to a case “to produce any document or to supply any explanation,”¹¹⁶ and may “entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion.”¹¹⁷

Sadly, instead of asking States who argued that not all potential threats or uses of nuclear weapons were *per se* unlawful to provide one or more examples, the Court essentially bypassed the task of applying the law to the most favorable conceivable set of facts implicit in the question before it.¹¹⁸ As Judge Higgins observed:

It is not sufficient, to answer the question put to it, for the Court merely briefly to state the requirements of the law of armed conflict (including humanitarian law) and then simply to move to the conclusion that the threat or use of nuclear weapons is generally unlawful by reference to the principles and norms. . . . At no point in its Opinion does the Court engage in the task that is surely at the heart of the question asked: the systematic application of the relevant law to the use or threat of nuclear weapons. It reaches its conclusions without the benefit of detailed analysis. An essential step in the judicial process—that of legal reasoning—has been omitted.¹¹⁹

This is unfortunate, because there are any of a number of hypotheticals which the Court could have envisioned (or which the nuclear-weapon States might have suggested) that might be used to illustrate a lawful use of a nuclear weapon. A single case should have allowed the Court to inform the General Assembly that in at least some circumstances the threat or use of nuclear weapons would be lawful—as the Court was neither requested nor expected to provide a comprehensive legal evaluation of every conceivable circumstance. Even at this date, it would seem useful to have such a hypothetical.

Consider for a moment the plight of the Russian Navy, whose sailors have often been required to go months without a paycheck and for whom the new regime promises little of the glory of earlier decades. Imagine that a group of Russian officers and their crew decide that action is warranted, and they decide to sell their *Delta IV*, *Typhoon*, or newer *Borey*-class¹²⁰ nuclear submarine to a terrorist group or international criminal cartel for a few million dollars. Alternatively, imagine they decide themselves to use this powerful weapons system to compel the world to restore Leninists to power throughout the old Soviet Empire—demanding in the process that all elected leaders of each current regime be publicly executed, *or else*.

To enforce these demands and illustrate the *else*, the group controlling the submarine launches three SS-N-18¹²¹ sea-launched ballistic missiles (SLBM)

from the mid-Atlantic, each with three 500-kiloton reentry vehicles (each with more than twenty-five times the destructive power of the device detonated over Hiroshima in 1945), targeted for air bursts over London, Paris, and Berlin during afternoon rush hour. Within less than an hour, millions of casualties are reported in Europe, and the long-term projections are even more frightening.

Having demonstrated its seriousness, the submarine continues towards the American coastline, its captain announcing that three of its remaining missiles will soon be fired at targets in the Washington, D.C., New York and Chicago areas. It will then move to the Pacific and attack targets in Los Angeles, San Diego, and Mexico City; and if confirmation has not been received that the changes in regimes and executions of “traitors” have taken place, similar attacks will be made in Japan, China, and perhaps other population centers in Asia. To deter any foolish efforts to destroy the submarine, the captain explains that all of his missiles will be launched immediately at American cities upon any detection of another submarine or warship in its vicinity, or if the sound of a launched torpedo is detected.

Let us suppose further that, with the cooperation of the Russian Government, the United States has been able to track the movement of the submarine. The Military Committee at the United Nations convenes, and upon its advice the Security Council immediately asks the United States to take effective military action to destroy the submarine *before* it launches the missile now reported to be aimed to impact within 500 meters of the UN Headquarters.

Does international law really require the American representative to the Security Council to announce:

Mr. President and Members of the Security Council. I have been in contact with my Government, and I have some good news and some bad news. The good news is that our Air Force reports that its pilots have the skill to drop a 20-kiloton nuclear device sufficiently close to the submarine that they are *certain* it would be destroyed instantaneously and without any warning, before any additional missiles could be launched. The bad news is that, pursuant to the legal principles enunciated by the International Court of Justice in the 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, since the United States could clearly “survive” the attacks which are being threatened—albeit with the projected loss of 10-20 million of our people—it is *unlawful* for us to attempt effective measures to defend ourselves (or the United Nations) in this situation. Indeed, the weapons that previously would have been available to address such a threat were removed from our inventory and dismantled some years ago. Let us pray.

Perhaps the threat instead would come from a Libya, Iran, Sudan, North Korea, or even Cuba that had purchased a used Soviet diesel submarine and installed primitive ballistic missiles designed to disperse toxic anthrax or other biological agents across population centers in various countries. One could hypothesize numerous such scenarios that would be as credible as any suggestion in 1989 that a year later Saddam Hussein would invade Kuwait and threaten to use weapons of mass destruction against UN sanctioned forces trying to protect Kuwait and its neighbors. One could multiply such examples several fold as the venue shifted from destroying submarines or other warships on the High Seas, to striking tanks or super-hardened military command posts or weapons bunkers in the desert, to assorted other options not involving direct attacks near population centers.

Indeed, as this writer has suggested elsewhere,¹²² one of the most effective means of *detering* aggression is to have the capability to attack radical regime elites who initiate aggressive wars. Possession of a highly-accurate, low-yield, deep penetrating “bunker-buster” nuclear device might well persuade a future Saddam Hussein—who had sacrificed hundreds of thousands of Iraqi soldiers in his war against Iran and was clearly willing to risk massive troop losses in his 1991 resistance to the UN Security Council—that initiating or continuing massive international aggression might well have negative consequences of a highly *personal* nature.¹²³

One need not devote pages of analysis to demonstrate that using a nuclear weapon against a terrorist submarine on the high seas, if necessary to terminate an ongoing barrage of far more destructive weapons of mass destruction against innocent civilians, is clearly consistent with *jus ad bellum* and *jus in bello*. It follows as well that the hypothesized attacks would not “threaten the survival of the State.”¹²⁴ Therefore, the Court’s extremely narrow exception in paragraph E of the *Dispositif* is simply wrong as a matter of international law. Fortunately, of course, advisory opinions of the World Court have no binding authority over States.¹²⁵

Making the World Safe for World War III: Limiting Defense and Undermining Deterrence

For anyone who has witnessed the inhumanity of war firsthand and cares about the preservation of peace, portions of the Court’s advisory opinion are disquieting. Without in the least disputing the horrendous consequences likely to be associated with any use of nuclear weapons, one can still wonder whether the judges have forgotten the frightening realities of *conventional* warfare?

Why, one must wonder, are they so eager to outlaw even the *threat* of a nuclear response to major acts of armed international aggression—is there some sense of “fair play” that leads them to wish to assure future Adolph Hitlers and Saddam Husseins that the consequences of massive aggression will never be too unacceptable?

The primary reason for the establishment of the United Nations, of which the International Court of Justice is the “principal judicial organ,”¹²⁶ is “to save succeeding generations from the scourge of war. . . .”¹²⁷ Yet many of the leaders of the antinuclear campaign which precipitated the General Assembly’s request for an advisory opinion view the problem not as stopping aggression—irrespective of the weapons used—but as merely eliminating *nuclear* weapons. One scholar, for example, envisions “an unprecedented opportunity” as the world approaches the new century “to create a world in which our children will be free from the threat of nuclear war.”¹²⁸ One is tempted to respond: “You mean like in Europe in 1915 and 1943?”

He tells us that “[s]ince 1945, humanity has lived on the edge of a precipice, with human history literally hanging in the balance,”¹²⁹ and that “[f]or over forty years, the world has lived with the relentless and harrowing fear that the nuclear arms race might eventually result in a nuclear war.”¹³⁰ One need not quarrel with such conclusions to note, as well, that in no small part because of the perceived horrendous consequences of such a war, during this same period, most of the world has also lived in peace.

This same writer expresses understandable alarm at estimates that a strategic nuclear exchange attacking only “key military targets” could kill 10 to 20 million people;¹³¹ but he *fails* to remind us that two-to-four times that many people died in the conventional phases of World War II,¹³² that more than 100 million people have died in major conventional wars in this century,¹³³ and that advances in conventional military technology in the past half-century strongly suggest that a non-nuclear World War III could be far more destructive of human life than were any earlier wars—even if one assumes that, once started, such a conflict would *not* ultimately escalate to the use of even *illegal* weapons of mass destruction.

The most vociferous critics of nuclear deterrence apparently see no distinction between the possession of such weapons by liberal democracies firmly committed to upholding the Charter principles and possession by rogue States and terrorist groups—ignoring a compelling body of political science that demonstrates that by far the most important variable in predicting the outbreak of war is not the existence or absence of any category of weapons, but the nature of the political systems of the potential parties to the conflict.¹³⁴

Compelling statistical data indicate that democracies do not attack democracies, and aggression results not from peaceloving States being too well armed, but far more commonly from a relatively small number of radical regime leaders concluding that they will benefit from aggression because their potential adversaries lack either the *will* or the *ability* to respond effectively to aggression.¹³⁵ As the American Founding Fathers understood,¹³⁶ and as the Latin maxim *qui desiderat pacem praeparet bellum*¹³⁷ affirms, it is perceived weakness, rather than strength, in its potential victims that encourages aggression.

Indeed, the most impressive contemporary scholarship demonstrates with remarkable clarity that both World War I and World War II resulted in large part from perceptions by potential aggressors that their victims, and States which might come to their aid, lacked *both* the will and the ability to respond effectively to aggression.¹³⁸ Thus, the eminent Yale University Historian Donald Kagan notes that, following World War I, "British leaders disarmed swiftly and thoroughly and refused to rearm in the face of obvious danger until it was too late to save France and almost too late to save Britain,"¹³⁹ and he observes that the failure of the League of Nations to act to defend Ethiopia from aggression in 1936 helped persuade Mussolini to join forces with Hitler: "The democracies seemed weak, indecisive, and cowardly, and their failure and inaction gave courage to their enemies."¹⁴⁰

When Hitler moved to remilitarize the Rhineland in violation of the Versailles Treaty, Professor Kagan notes that "British policy was to avoid war at all costs,"¹⁴¹ and that Hitler had actually promised his generals that he would withdraw his forces at the first sight of French resistance. He quotes Hitler as later writing: "The forty-eight hours after the march into the Rhineland were the most nerve-wracking in my life. If the French had then marched into the Rhineland we would have had to withdraw with our tails between our legs, for the military resources at our disposal would have been wholly inadequate for even a moderate resistance."¹⁴² Professor Kagan writes:

There is no doubt that some leaders of the German Army were powerfully opposed to an attack on Czechoslovakia . . . [in 1938] because they believed it would lead to a general war for which Germany was not prepared and which it was bound to lose. When they confronted Hitler he assured them that Britain and France would not fight. . . . Perhaps the most important reason for the failure of this belated attempt at deterrence was that it lacked credibility. Whatever its military capabilities, would Britain have the will to use them? Whatever their commitments, would the British have the courage to honor them? . . . Small wonder that Hitler never seems to have taken his opponents' warnings seriously.

As he laid plans for the attack on Poland he discounted the danger from the leaders of Britain and France. "I saw them at Munich," he said. "They are little worms."¹⁴³

World War II did not result from a failure of "arms control" or the presence of too many weapons. The London and Washington naval agreements helped *weaken* the military power of the democracies, and after the war was over, Japanese leaders explained that watching movie newsclips of American soldiers in Mississippi training with wooden rifles had helped convince them of American weakness—and thus *strengthened* the case for attacking Pearl Harbor.¹⁴⁴

Properly utilized, international law has a powerful contribution to make to the cause of international peace and security. But parchment barriers like the NPT, the Geneva Protocol on chemical and bacteriological warfare,¹⁴⁵ and the Chemical Weapons Convention (CWC),¹⁴⁶ are not *enough* to guarantee peace. The reason Hitler did not use his chemical weapons when the tides of battle turned against him during World War II was not out of respect for international law, but because he knew the Allies would retaliate in kind as a belligerent reprisal. Indeed, if all that were necessary to control aggression were more solemn, legally-binding, promises, we would need no new treaties—for any act of aggression will automatically breach the most fundamental principle of the UN Charter.¹⁴⁷ Why assume that a tyrant who is willing to ignore the UN Charter is going to abide by any lesser legal obligation that is not self-enforcing?

The world should have learned from recent experiences with North Korea and Iraq that, by itself, the NPT is not likely to prevent the unlawful procurement of nuclear weapons. As has been noted time and again, that "genie" is out of the bottle, and the basic technology is reportedly even available in public libraries and on the Internet. Efforts to erect new legal barriers to the possession, threat, or use of nuclear weapons—while not necessarily unhelpful or a bad idea—risk missing the point that the primary goal is to prevent *war* of any kind.

University of Iowa Professor Burns Weston is certainly one of the most intelligent, articulate, and respected scholars in the "ban-the-bomb" camp; and in a 1989 address to the First World Congress of the International Association of Lawyers against Nuclear Arms, Professor Weston observed: "to rid ourselves of the *nuclear* habit we must rid ourselves also of the *war* habit."¹⁴⁸ Yet he acts as if there were no distinction between aggressor and victim, contending that "nothing is more menacing to the long-term well-being of our planet than the sincerely communicated threat to use nuclear weapons if and when sufficiently provoked."¹⁴⁹ He apparently sees no moral distinction, and

no implication for the preservation of peace, between that “threat” being made by someone like Saddam Hussein to compel peaceful Kuwait to submit to his aggression, and such a “threat” being made by a State that is being “provoked” by a flagrant act of armed international aggression and is acting under the authority of a resolution of the Security Council, in order to dissuade the aggressor from resorting to the illegal use of weapons of mass destruction that might claim millions of innocent lives.¹⁵⁰ There is a difference.

Rather than permitting peaceloving States to use the threat¹⁵¹ of a nuclear response to deter aggression and protect peace, Professor Weston would have us disarm them of the weapons that have proven most effective in deterring massive acts of international aggression for most of this century; suggesting in the alternative that all the world really needs are a few new “mutual nonaggression” pacts. In 1989 he wrote of the need for such treaties between NATO and the Warsaw Pact,¹⁵² and between the United States and the Soviet Union;¹⁵³ and one might assume that today his solution to what might be called the “Saddam Hussein problem” would be to get the Iraqi leader to sign a new binding international agreement promising, henceforth, to be good.

Of course, Iraq is *already* a party to the UN Charter, the Nuclear Nonproliferation Treaty, and various other solemn international treaties which clearly prohibit the things Saddam has been doing (invading his neighbors, developing chemical, biological, and nuclear weapons, etc.); but surely if we could just get him to sign one more piece of paper he would change his ways—*especially* if we could assure him that his victims will no longer be able to respond most effectively if he violates his promise.

The logic is so compelling that one can only wonder why the world didn’t think of it earlier? Imagine the lives that might have been saved had we just been able to get Germany and Japan to ratify a binding international treaty condemning “recourse to war for the solution of international controversies” and renouncing war “as an instrument of national policy”¹⁵⁴ a decade before the outbreak of World War II. Readers who recall the optimism that greeted the 1928 Kellogg-Briand Pact may recall as well that it was solemnly ratified by both Japan¹⁵⁵ and Germany¹⁵⁶—leading many people to conclude after the outbreak of World War II that international law was inherently ineffective as an instrument of peace. A better lesson to draw from this unfortunate experience is that *unenforced* international law is an unreliable barrier to aggression;¹⁵⁷ and a corollary may well be that aggression is *encouraged* when law-abiding States are denied the legal right to seek to deter aggression with their most effective legal weapons and the aid of other peaceloving States.

Put simply, the (former) President of the World Court was *mistaken* when he described nuclear weapons as being “the ultimate evil. . . .”¹⁵⁸ In this context, if there is an “ultimate evil” it is probably the kind of armed international aggression that results in the large-scale slaughter of innocent people and the subjugation of human freedom. When nuclear weapons—or *any* weapons—are used for that purpose, they are used in an evil manner. When they are used to dissuade potential aggressors from slaughtering or enslaving their neighbors, they serve a positive moral value. The weapons themselves have no inherent moral content.¹⁵⁹

The Military Utility of Nuclear Weapons

A central theme of much of the legal criticism of nuclear weapons is that, because of their inherent nature, they have no legitimate military purpose or value. Thus, States should not hesitate to give them up, and there is no legitimate “cost” in banning them. For example, in his book *Prohibition of Nuclear Weapons: The Relevance of International Law*, Elliott L. Meyrowitz asserts that “the nature and effect of nuclear weapons are such that they are inherently incapable of being limited with any degree of certainty to a specific military target.”¹⁶⁰ From such reasoning he concludes that “nuclear weapons have no military utility.”¹⁶¹

This is simply mistaken. Even if one were to assume that no State would ever likely again elect to resort to such weapons during combat, it is a dangerous fallacy to assume that weapons can have no utility or “military value” outside of combat. Indeed, the great Chinese strategist Sun Tzu emphasized this point well more than 2,500 years ago when he wrote: “For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.”¹⁶²

A thorough discussion of the utility of nuclear weapons is far beyond the scope of this short chapter, but two examples should suffice to establish the point. The first is the critically important role that nuclear weapons obviously played in keeping Europe at peace throughout the Cold War; and the second is the successful use of the implied threat of a nuclear reprisal if Saddam Hussein continued with his plans to use chemical or biological weapons during the 1990–91 Persian Gulf conflict.

Nuclear Deterrence and the Cold War. It is critically important to keep in mind, as the world seeks relief from its fear of intentional or accidental nuclear holocaust, that the world as a whole has seen a remarkable era of relative peace for more than half-a-century, and that no single factor has likely played a more

decisive role in bringing this about than the shared perception of the unacceptability and futility of nuclear war and the realization that such an outcome might be an unintended consequence of the escalation of any major act of aggression by conventional weapons.

Conrad Harper, the Legal Adviser to the U.S. Department of State in 1995, cautioned the Court that “nuclear deterrence has contributed substantially during the past 50 years to the enhancement of strategic stability, the avoidance of global conflict and the maintenance of international peace and security.”¹⁶³ Similarly, Sir Nicholas Lyell, Agent for the United Kingdom, observed:

[T]hese two requests [by the General Assembly and World Health Organisation] ignore . . . the somber but vital role played by nuclear weapons in the system of international security over the past 50 years. . . . Our real world remains a fragmented and dangerous place, and in this real world, to call in question now the legal basis of the system of deterrence on which so many States have relied for so long for the protection of their people could have a profoundly destabilizing effect.¹⁶⁴

Perhaps no one formally involved in the case expressed this point more eloquently than Judge Rosalyn Higgins (United Kingdom):

One cannot be unaffected by the knowledge of the unbearable suffering and vast destruction that nuclear weapons can cause. And one can well understand that it is expected of those who care about such suffering and devastation that they should declare its cause illegal. It may well be asked of a judge whether, in engaging in legal analysis of such concepts as “unnecessary suffering,” “collateral damage” and “entitlement to self-defence,” one has not lost sight of the real human circumstances involved. The judicial loadstar . . . must be those values that international law seeks to promote and protect. In the present case, it is the physical survival of the peoples that we must constantly have in view. We live in a decentralized world order, in which some States are known to possess nuclear weapons but choose to remain outside of the non-proliferation treaty system; while other such non-parties have declared their intention to obtain nuclear weapons; and yet other States are believed clandestinely to possess, or to be working shortly to possess nuclear weapons (some of whom indeed may be a party to the NPT). It is not clear to me that either a pronouncement of illegality in all circumstances of the use of nuclear weapons or the answers formulated by the Court in paragraph 2E best serve to protect mankind against that unimaginable suffering that we all fear.¹⁶⁵

Deterring Saddam’s WMDs in the Gulf War. Anyone who doubts that the threat of a nuclear response can deter wrongful conduct should read the

Dissenting Opinion in the *Nuclear Weapons* case of then-World Court Vice President (now President) Steven M. Schwebel (United States), who cites chapter and verse in demonstrating that in 1990–91, American threats to retaliate with nuclear weapons persuaded the Iraqi regime not to make use of the 150 bombs and 25 ballistic-missile warheads filed with anthrax toxin that had been specially prepared for use during the war. Judge Schwebel quotes at length, for example, from a *Washington Post* article of 26 August 1995:

Iraq has released to the United Nations new evidence that it was prepared to use deadly toxins and bacteria against U.S. and allied forces during the 1991 Persian Gulf War that liberated Kuwait from its Iraqi occupiers, U.N. Ambassador Rolf Ekeus said today.

Ekeus, the chief U.N. investigator of Iraq's weapons programs, said Iraqi officials admitted to him in Baghdad last week that in December 1990 they loaded three types of biological agents into roughly 200 missile warheads and aircraft bombs that were then distributed to air bases and a missile site. . . .

U.S. and U.N. officials said the Iraqi weapons contained enough biological agents to have killed hundreds of thousands of people and spread horrible diseases. . . .

Ekeus said Iraqi officials claimed they decided not to use the weapons after receiving a strong but ambiguously worded warning from the Bush administration on Jan. 9, 1991, that any use of unconventional warfare would provoke a devastating response.

Iraq's leadership assumed this meant Washington would retaliate with nuclear weapons, Ekeus said he was told.¹⁶⁶

Judge Schwebel also quotes from an interview with Iraqi Foreign Minister Tariq Aziz on the U.S. public television program *Frontline*, in which Aziz was asked why the expected chemical attack on U.S. forces "never came." He replied: "We didn't think that it was wise to use them. That's all what I can say. That was not—was not *wise* to use such kind of weapons in such kind of a war with—with such an enemy."¹⁶⁷

After placing on the record an abundance of evidence of the impact on Iraqi policy of the American threat¹⁶⁸ to retaliate with nuclear weapons in the event of an Iraqi use of weapons of mass destruction (even though such a response had apparently been eliminated as an option before the war started¹⁶⁹), Judge Schwebel concluded:

Thus there is on record remarkable evidence indicating that an aggressor was or may have been deterred from using outlawed weapons of mass destruction against forces and countries arrayed against its aggression at the call of the United Nations by what the aggressor perceived to be a threat to use nuclear weapons against it should it first use weapons of mass destruction against the forces of the coalition. Can it seriously be maintained that Mr. Baker's calculated—and apparently successful—threat was unlawful? Surely the principles of the United Nations Charter were sustained rather than transgressed by the threat.¹⁷⁰

The Characteristics of Modern Nuclear Weapons. For perhaps understandable reasons, governments are reluctant to discuss publicly the details of their most sensitive military programs. Former government officials and employees who have been granted access to highly classified defense programs are usually prohibited from discussing such details as well. Having been personally involved—quite unsuccessfully—in trying to persuade the United States Government to declassify persuasive evidence in connection with an earlier ICJ case more than a dozen years ago,¹⁷¹ the present writer is not completely surprised that the official submissions to the Court did not focus on the technical details of the latest generation of nuclear weapons. Perhaps the strongest statement in this regard was by the Government of the United Kingdom, which told the Court:

[M]uch of the writing on nuclear weapons on which these arguments rely dates from the 1950's and early 1960's. Modern nuclear weapons are capable of far more precise targeting and can therefore be directed against specific military objectives without the indiscriminate effect on the civilian population which the older literature assumed to be inevitable.¹⁷²

Many references to the nature of nuclear weapons in presentations to the Court, and even portions of the Court's opinion,¹⁷³ suggest that this observation by the United Kingdom is correct. Not all "nuclear weapons" are identical. The Soviet Union, for example, once designed a nuclear weapon with a yield of 150 megatons and tested one with a yield of approximately 50 megatons.¹⁷⁴ Identifying a use for such weapons consistent with the law of armed conflict would be extremely difficult, and most possible uses of a weapon capable of 1/100th of that level of destructiveness might well conflict with the law—particularly if used anywhere near a concentration of noncombatants. But the reported trend in the latest generation of nuclear weapons is towards much smaller and far more accurate devices, and it is these devices that must be considered—in the light of all of the circumstances of a given situation—in

assessing the lawfulness of a potential use. The Court seems to have made no effort to inquire into the characteristics of such weapons,¹⁷⁵ apparently finding it more convenient to make assumptions based upon knowledge acquired in earlier decades and undocumented assertions made by critics who quite likely were also not privy to information on highly classified defense programs of the nuclear-weapons States.

Thus, the President of the Court concluded that:

Nuclear weapons can be expected—in the present state of scientific development at least—to cause indiscriminate victims among combatants and non-combatants alike, as well as unnecessary suffering among both categories. The very nature of this blind weapon therefore has a destabilizing effect on humanitarian law which regulates discernment in the type of weapon used. . . . Until scientists are able to develop a “clean” nuclear weapon which would distinguish between combatants and non-combatants, nuclear weapons will clearly have indiscriminate effects and constitute an absolute challenge to humanitarian law.¹⁷⁶

The present writer has had no access to classified information on this topic in well over a decade, but judging from readily available press reports it seems likely that modern nuclear weapons have already satisfied this requirement. A report in *Time* magazine in connection with the recent confrontation between Saddam Hussein and the UN Security Council, for example, noted that “New weapons with ever increasing accuracy led the Pentagon to be confident that few will stray, thus limiting what military euphemists refer to as ‘collateral damage’—innocent, but dead, civilians.”¹⁷⁷ It notes that in the September 1995 attacks on Bosnian Serb strongholds that led to the Dayton Accord, the Air Force reported 97 percent accuracy of its “smart bombs”—far superior to the success record in Operation Desert Storm less than five years earlier. By using Global Positioning System (GPS) satellites for guidance (rather than lasers, which could be thrown off target by smoke or bad weather), and new high-tech fuses that can actually “count” floors in an underground bunker and explode only upon reaching a pre-selected level, the United States had achieved weapons of unprecedented accuracy.¹⁷⁸

Because of the increased accuracy, most targets can be defeated by the use of conventional high-explosive warheads, such as the GBU-28¹⁷⁹ and GBU-35¹⁸⁰ 5,000-pound “bunker busters;” however, the highly regarded *Aviation Week & Space Technology* quotes a retired senior Air Force general as saying “You can’t attack all the chemical and biological weapons storage sites” in Iraq, because “[s]ome are too far underground. . . .”¹⁸¹

Frank Robbins, Director of the Precision Strike Weapons Technology Office at Eglin Air Force Base in Florida, was quoted in *Defense Week* as stating that GPS-guided munitions “could hit a target the size of a man’s upper torso within a metropolitan area as large as . . . Washington-Baltimore.”¹⁸² However, when that man’s upper torso-size target is buried deeply underground, below the range of any conventional weapon that can be carried by the latest U.S. bombers,¹⁸³ the only means of deterring a foreign tyrant considering launching an aggressive war—or neutralizing his supply of weapons of mass destruction before they can be fired at the civilian populations of neighboring States—may be with a nuclear warhead.

The *Bulletin of the Atomic Scientists* reported in late 1997 that the United States had earlier that year deployed the B61 earth-penetrating nuclear warhead to destroy “superhardened” or “deeply buried” targets “with great precision and bewildering agility, no matter their location.”¹⁸⁴ The article asserts that the United States is seeking the ability to destroy “underground targets, with greater discrimination,” for possible counterproliferation purposes, and that one recent report by nuclear weapons experts suggests that “a small nuclear warhead [like the B61] is the best way to neutralize anthrax agents.” The present writer emphasizes that he has no personal knowledge about any of these programs, but assuming for the moment that these generally well-connected sources are correct, they identify critically important military missions which might not be achievable through the use of conventional ordinance. While it is obvious that the legality of any particular use of such weapons must be determined in the context of the purpose for which it is used, projected collateral damage, and other considerations, it is equally clear that not every use of such weapons would be unlawful. Indeed, one could easily conceive of settings in which such a use of nuclear weapons would claim few if any noncombatant lives, while in the process saving millions of lives that might otherwise be vulnerable to weapons of mass destruction.

Once again, the utility of such weapons must also be evaluated in terms of their contribution to maintaining peace by deterring potential aggressors from initiating conflict. If small nuclear weapons make it possible for the United States to place the potential aggressor State’s leadership at risk, and to neutralize an anthrax bomb before it can harm anyone, this serves both to diminish the perceived value of anthrax weapons and to place at personal risk decision makers who may be contemplating threatening the peace. Both of these consequences are highly desirable—irrespective of whether such weapons would ever actually be used in combat.

Perhaps it was inevitable—and even *wise*—for the Court to refrain from making a detailed speculative inquiry into the technological characteristics of modern nuclear weapons. But without doing so, the Court obviously lacked the knowledge necessary to draw legal conclusions based upon the application of the legal principles it had identified as being germane to the threat or use of these weapons. Its conclusions must therefore be considered in the light of this shortcoming.

There are some very able, knowledgeable, and respected military professionals who have concluded that nuclear weapons are unnecessary and inherently immoral.¹⁸⁵ Their technical understanding of such weapons is far superior to that of the present writer, and in terms of the actual use of such weapons they may well be right. Surely, anyone with an ounce of sense realizes that nuclear war would be horrible beyond description. But precisely because of their perceived horror, the existence of these weapons has ironically thus far been a powerful force for world peace. And with admitted exceptions, military and political leaders in the democracies who know the most about these weapons continue to believe they have military utility.¹⁸⁶

Nuclear Weapons as a Force for Peace

Perhaps it is time for a “reality check.” Strategic nuclear weapons are capable of incomprehensible devastation, and it doesn’t require a World Court decision to make this point. It is not coincidental that they have not been used a single time in more than half-a-century since they were first developed and used to bring an end to World War II. One can only pray that they will never have to be used again.

But one can also look back at the Cold War era and realize that the world might well be a far different place today had such frightening weapons not been introduced into national inventories. They have imposed a level of sanity on world leaders who otherwise had considerable incentives to promote violent change. Largely because of the respect among decision makers on all sides for the consequences of nuclear conflict, an unstable political confrontation that might easily have resulted in World War III was replaced by nearly half-a-century of political struggle and occasional *détente*, punctuated on occasion by relatively minor¹⁸⁷ coercive settings on the periphery of the presumptive battlefield.

The foes of nuclear weapons will not acknowledge it, but it is quite probable that the existence of nuclear weapons was the single most important factor in keeping Europe at peace for nearly half-a-century following World War

II—longer than Europe had experienced peace in many centuries. To be sure, the standoff was frightening and the risks of error were horrific; but the existence of a nuclear-armed NATO probably saved tens of millions of lives in Europe alone.

Complete Disarmament Is an Impractical Dream

In a 1793 letter to James Monroe, Thomas Jefferson remarked, with his characteristic perception: “I believe that through all America there has been but a single sentiment on the subject of peace and war, which was in favor of the former. . . . We have differed, perhaps, as to the tone of conduct exactly adapted to secure it.”¹⁸⁸ We may also have differed on the price to be paid for it, for as John Stuart Mill once noted:

War is an ugly thing, but not the ugliest of things: the decayed and degraded state of moral and patriotic feeling which thinks nothing *worth* a war, is worse. . . . A man who has nothing which he is willing to fight for, nothing which he cares more about than he does about his personal safety, is a miserable creature who has no chance of being free, unless made and kept so by the exertions of better men than himself.¹⁸⁹

Who doesn’t want *peace*? No rational, sane citizen of *any* country favors war when peace can be had without price, and the vision of a world without war is enticing. A simple—perhaps overly so—logic suggests that since wars are fought with weapons, if we can just rid the world of weapons we can guarantee peace. Wars, by this theory, result largely from the existence of weapons and from military imbalances which promise benefits for the strong. (The wisdom of this theory is easily established by reviewing the past two centuries of U.S.-Canadian relations.)

Since we all *in principle* favor peace and would welcome a world in which all beings lived in peace and respected the rights of others, it follows that we would incorporate the aspirational goal of general and complete disarmament in precatory language designed to make everyone feel good at the conclusion of a less ambitious effort to control instruments of war—as was apparently done in Article VI of the NPT.¹⁹⁰ This is not to suggest that the parties were *disingenuous* in committing to pursue negotiations “on a treaty on general and complete disarmament under strict and effective international control”—presumably every peaceloving State would favor such a goal, if the control machinery were certain to be *effective* and could be implemented without totally undermining the sovereignty of individual States and the privacy of their citizens—but it is

likely that only the most naive delegates anticipated witnessing the conclusion of such an agreement in their own lifetimes.

Professor Richard B. Bilder is but one of many respected commentators to observe that the “nuclear genie” is “out of the bottle,” and that “[t]here are already over 50,000 of those weapons, knowledge of how to build them will never disappear. . . .”¹⁹¹ Certain chemical and biological weapons are even simpler to build and to conceal. The inability of the world community to control illicit drugs provides some insight to this dilemma, and much of that activity takes place despite serious efforts by host States to prevent it. Those who recall the experience of the Gulf War will realize that it is necessary to be able to send inspectors not only to established military installations and chemical or medical laboratories, but also to inspect such places as “baby milk” factories¹⁹²—and quite likely alleged “religious” and “cultural” properties as well. Indeed, one might anticipate that if any single category of facility were declared “off limits” for inspectors, that would be the most attractive place to engage in prohibited behavior.

One would certainly expect a clever leader who wished to engage in covert development and production of prohibited weapons to try to “raise the costs of inspection” by concealing such activities in locations that might prove embarrassing for foreigners to enter, and then to use political warfare techniques to intimidate and discredit the inspectors if they nevertheless endeavored to do their job. At the same time, potential violators would presumably demand the most intrusive inspections within democratic States—both as an intelligence-gathering technique and as a means of pressuring other States to accept what might be called “informal accommodations” which would lessen the mutual inconvenience of inspections (and probably in the process make them virtually meaningless).¹⁹³

Professor Almond has observed: “Because disarmament agreements are very difficult to verify without major intrusions into the territory of each of the parties, the possibility of concluding such an agreement is slight.”¹⁹⁴ Other experts have made similar points.¹⁹⁵ It is also clear that the closer one comes to total disarmament, the more significant a small amount of “cheating” becomes and thus the greater the incentive to cheat. In a world with tens of thousands of nuclear weapons, a State that can covertly manufacture half-a-dozen nuclear devices is not going to dramatically transform the balance of power—especially if the Security Council can remain functional. But if all law-abiding countries eliminate all of their nuclear weapons—and, pursuant to the Court’s interpretation of Article VI of the NPT, their conventional weapons as well—then the incentives for an ambitious tyrant to secretly build a small

inventory of prohibited weapons are considerably enhanced. A tyrant with a global monopoly on weapons of mass destruction, and a willingness to actually use them, would be a powerful actor indeed. So, in the absence of "strict and effective international control" to guarantee (assuming that were even theoretically possible) that no State was "breaking the rules," an unenforceable agreement requiring States to destroy all nuclear weapons (or all weapons of any kind) could well prove highly counterproductive to such Charter values as international peace, human dignity, and freedom.

Today, any tyrant contemplating building nuclear weapons for aggressive purposes must consider the assurances of the world's strongest military powers that they will come to the defense of any NPT party that is a victim of aggression or a threat of aggression involving nuclear weapons.¹⁹⁶ That is a fairly strong disincentive: Why bother to build a small nuclear stockpile to harass your neighbors if the immediate consequence will be to bring you into conflict with the major nuclear powers? We must ask why the World Court seems so anxious to undermine this disincentive, in the process increasing the relative political and military value of a small stock of illicit nuclear weapons (and thus the incentive to acquire them) perhaps a thousand-fold?

Any country that pretends to take seriously the vision of general and complete disarmament ought first to be willing to demonstrate the effectiveness of such a concept at the national level. Let them first take the guns and clubs from their own military and police forces, remove all kitchen knives from their homes, and display for the world to admire a functioning utopian model of universal peace and tranquillity without the threat or use of force. (To paraphrase a comment once made about the practical shortcomings of socialism: "nice idea; wrong species.") Until that is done, the serious business of trying to promote a more peaceful world ought not be distracted by such silly, dangerous, illusions.

Given the political nature of the entire process, and the risk that under pressure from so-called "peace" groups, NGOs, and numerous Third-World States, the Court would have ignored the law and pronounced a dangerous new doctrine limiting the rights of States to use nuclear weapons to deter aggression and defend themselves and their allies if necessary, one must on balance view the advisory opinion with relief and some satisfaction. Basically, the Court got the *law* right. It overwhelmingly concluded that there is no conventional prohibition *per se* against the threat or use of nuclear

weapons, and similarly found no rule of customary law to support the position embodied in the General Assembly Resolution. It also quite properly noted that, like *all* weapons, nuclear weapons may not be used in violation of *jus ad bellum* or *jus in bello*—such as to commit aggression against a prohibited target or in a manner disproportional or unnecessary to the legitimate defensive needs of a particular situation. It also noted that the highly destructive nature of such weapons, and the commonly associated collateral effects like fallout and radioactive contamination, clearly made such weapons unsuitable for any but the most serious of settings. From the standpoint of its proper function and the rules of international law, had the opinion stopped there it would have been not only unobjectionable but quite commendable.

From a political standpoint, however, such an opinion would have been less than ideal, as it would have constituted a complete rejection of the views of the countries and NGOs that had championed the initiative. While the Court's courage in resisting political pressure on the fundamental legal issues raised by the request is commendable, its decision to go further and include language apparently carefully designed to placate this considerable political bloc (and presumably the personal preferences of several of the judges) is regrettable. The decision led the Court first to depart from the judicial task of identifying and applying legal principles to specific facts associated with the highly technical and secretive field of modern nuclear weapons technology for which it lacked both the necessary factual information and the scientific expertise to make meaningful judgments; and secondly to gratuitously address an issue that had not been part of the request—and, more sadly still, to arrive unanimously at the wrong answer.

As has been discussed, the Court's speculation about possible uses of nuclear weapons that might comply with existing *jus in bellum* quickly took the judges into a realm where they lacked sufficient expertise or information to make sound judgments. Apparently (and understandably) not being familiar with the characteristics of the latest generation of nuclear weapons, the Court seems to have assumed that any such weapons would necessarily and indiscriminately slaughter hundreds of thousands if not millions of combatants and noncombatants alike; and trying to hypothesize any scenario in which such conduct would *not* conflict with the laws governing military operations was, not surprisingly, difficult.

Trying to emphasize the extreme nature of any such exception, the Court spoke in terms of defending against a threat to the survival of a State—which is not a bad *example* of a situation in which resort to a nuclear weapon might be justified. But it is hardly the *only* example. It would seem clear, for example,

that a victim of aggression that concluded that the use of nuclear weapons against an aggressor's underground stockpiles of weapons of mass destruction (or hardened military delivery systems for such weapons) was the only defense likely to save the lives of tens of millions of its citizens—even though the State might ultimately “survive” with even half of its original population—would be permitted under international law to make use of such weapons. The mere *threat* of such a defensive response is still less objectionable as a means of dissuading aggressive intentions.

As an aside, some confusion may result from a misreading of the quite accurate and important language in paragraph 47 of the Court's opinion linking the lawfulness of a “threat” to use force with the underlying question of whether the actual use of force in that setting is permissible under the Charter. The Court concluded:

The notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.¹⁹⁷

This is correct. But it does not follow that this rule—which governs *jus ad bellum* and is associated with Article 2(4) of the Charter—applies in analyzing a threat or use of force under *jus in bello*. A State is required to consider the probable magnitude and risk of collateral damage to noncombatants when deciding whether it is lawful to attack an otherwise lawful military target, and for that reason, some tyrants find it convenient to place important military targets in the middle of population centers—presumably hoping that even if it remains “legal” for a country like the United States to attack the target (which it generally does), considerations of humanity and more pragmatic concerns of public opinion will act as a deterrent. But a *threat* to use nuclear (or other) weapons in a defensive response to armed aggression does not endanger the interests protected by international humanitarian law.¹⁹⁸ Since, as already noted, the aggressive threat or use of nuclear weapons is already prohibited by the Charter, any analysis of potential defensive behavior needs to discriminate between actual use (which must comply with *jus in bello*) and expressed or implied *threats* aimed at enhancing deterrence. Deterring armed international aggression, after all, is an important Charter value.

The legal test that ought to be used in responding to the General Assembly's question is not whether the Court majority successfully anticipated every future act of aggression which might legally be met with a particular defensive

nuclear response, but whether in *every* given situation the use of such weapons necessarily violates some governing legal principle. The Court's ignorance about recent (or future) technological developments in the characteristics of nuclear weapons does not alter the principle legal conclusions of the opinion. The proper test of the lawfulness of nuclear weapons is precisely the same as the test applied to any other weapon that has not been expressly banned: Does the action under all of the relevant circumstances violate any applicable provision of international law?

Applying this test, it is abundantly clear that:

Nuclear weapons may not be used aggressively, or in any other manner contrary to a State's relevant treaty commitments;

Nuclear weapons may not be used contrary to any applicable rule of customary international law binding upon the State considering their use;¹⁹⁹

Nuclear weapons may not be used against targets prohibited by international law;²⁰⁰

Nuclear weapons may not be used even *defensively* except consistent with the legal rules which constrain the use of all force in self-defense and collective self-defense, such as necessity, proportionality, and discrimination.

These principles are uncontroversial, unobjectionable, and fully consistent with United States military doctrine dating back more than four decades.²⁰¹ Beyond that, the Court's speculation that the horrendous inherent characteristics of all nuclear weapons would preclude any use from satisfying these legal tests that did not involve a threat to "the very survival of a State" is only legally meaningful to the extent that the Court's comprehension of the nature of such weapons—today and tomorrow—was accurate. The legally significant point to the opinion is the *test* to be applied, not the prescience of the judges in foreseeing every conceivable circumstances that might threaten a State in the years ahead, or their perspicacity in understanding current military technology. To the extent the Court's uninformed and speculative inquiry—one might better say *noninquiry*, as there was little evidence of serious inquiry in the opinion—into the technical nature of modern nuclear weapons was unsoundly premised, the legal conclusions seven of the fourteen judges drew from that factual predicate are of little value. They certainly do not constitute binding rules limiting the conduct of States.

As much as the sponsors of the General Assembly request may have wished, once the Court properly recognized that neither conventional nor customary international law prohibits the defensive threat or use of nuclear weapons (so long as such conduct complies with the law of armed conflict), the Court clearly lacked the authority to modify those legal rules to conform to the political preferences of members of the Court or a plurality of members of the United Nations. Therefore, the Court's subsequent speculation about possible settings in which the use of such weapons would comply with the laws of armed conflict may have been a useful reminder of the potential horror of nuclear weapons, but to the extent it was premised upon factual error or limited vision, it is of no legal significance. The test remains whether a threat or use of nuclear weapons is consistent with the relevant rules of international law under all of the specific circumstances in which it occurs. It is a good test, and it is precisely the test that the United States has long recognized as controlling. The fact that the judges who most strongly favored a *per se* prohibition on the threat or use of nuclear weapons found it necessary to dissent from the majority opinion stands in clear refutation of the "spin control" efforts of antinuclear activists to portray the advisory opinion in a light more favorable to their political perspective. The clear reality is that they lost, and, as ironic as it may seem to some, the cause of international peace and effective deterrence emerges clearly victorious from a proper reading of the case.

Notes

1. This does not include all of the thirty-five countries which earlier submitted opinions in the companion request by the World Health Organization for an advisory opinion, which was rejected by the World Court as exceeding the proper jurisdiction of the organization.

2. Unlike the U.S. Supreme Court, which by the Constitution is limited to deciding "cases" or "controversies" (U.S. CONST. art. III, §2) the World Court is expressly authorized to give nonbinding "advisory opinions" to the Security Council, General Assembly, and other UN organs to assist them in fulfilling their own responsibilities. See U.N. CHARTER art. 96; I.C.J. STAT. arts. 65–68.

3. The CND "Information Officer" wrote in a letter to the editor: "I sat in the International Court of Justice while it ruled that the threat or use of nuclear weapons was illegal under international law." *Letters*, THE INDEPENDENT (London), July 11, 1996, at 17. See also, Christopher Bellamy, *World Takes First Steps to Ban the Bomb*, *id.* July 9, 1996, at 1 ("Last night, anti-nuclear pressure groups, including CND, were claiming victory. . ."). The CND web page (<http://mcb.net/cnd/cndtoday/winter97/>) includes an article from *CND Today* (Winter 1997) which interprets the case as establishing that "The threat or use of nuclear weapons is illegal in all conceivable circumstances," and notes that "The Court . . . found no nuclear weapon which could comply" with international humanitarian law. (Of course, by similar reasoning, one might note that the Court did not identify any nuclear weapon which could not under any circumstances comply, but how many people will read the actual case?) Interestingly, the article

asserts that individuals being prosecuted in European courts for “serious anti-nuclear actions” (e.g., destroying government property) were successfully citing as a defense the ICJ *Nuclear Weapons* case. For readers who are not familiar with the CND, it was the original “ban-the-bomb” group established in Great Britain more than four decades ago and is perhaps most famous for having originated the so-called “peace sign,” using a black circle around a vertical line with what might be described as an inverted “V” joining the line in the center. This symbol represents the international semaphore flag code for the letters N (flags extended downward on both sides at 45 degree angles from the legs) and D (left flag down, right flag above head—creating the appearance of a vertical line), signifying “Nuclear Disarmament.”

4. A Greenpeace spokesman declared that “The ruling, in fact, means that any use or threat to use nuclear weapons could be in breach of international law,” and declared the opinion to be “much stronger than I expected.” *Disarmament: World Court Decision “Misunderstood,”* INTER PRESS SERVICE, July 10, 1996, available in 1996 WL 10768077.

5. The American co-president of this group characterized the opinion as “much better than what we expected.” Jonathan C. Randal, *World Court: Nuclear Arms Mostly Illegal*, WASH. POST, July 9, 1996, at A12.

6. This statement is based upon personal conversations by the writer with lawyers who took part in arguing the case.

7. For an excellent summary of the background to both the WHO and UNGA resolutions, see, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 3 (July 8) [hereinafter cited as *Nuclear Weapons*], (Dissenting Opinion of Judge Oda at 3–23). See also Lt Col Michael N. Schmitt, USAF, *The International Court of Justice and the Use of Nuclear Weapons*, 51(2) NAVAL WAR C. REV. 91, 92–94 (Spring 1998); and *Nuclear Weapons*, Statement of the Government of the United Kingdom, June 1995, part II at 3–5.

8. *Japan Mum on World Court Refusal to Rule on Nuke Use*, KYODO NEWS INTERNATIONAL, INC., July 15, 1996, available in 1996 WL 7593453.

9. *Id.*

10. See, e.g., *Asides: In Their Opinion* (editorial), WALL ST. J., July 15, 1996, at A12 (characterizing the case as ruling “that the threat or use of nuclear weapons is not only really bad, but also illegal according to international law.”). See also, Thalif Deen, *Use of Nuclear Weapons Illegal, Says World Court*, JANE’S DEFENCE WEEKLY, July 17, 1996, at 4 (quoting Daniel Ellsberg).

11. For a discussion of the Court’s handling of this case, see Peter H. F. Bekker, *Dismissal of Request by World Health Organization for Advisory Opinion on Legality of Nuclear Weapons*, 91 AM. J. INT’L L. 134 (1997).

12. U.N. CHARTER art. 96 (“The General Assembly . . . may request the International Court of Justice to give an advisory opinion on any legal question.”).

13. The General Assembly is not a “legislative” body and its resolutions, by themselves, do not create or determine international law (except to the extent it is empowered to make binding decisions having to do with the functioning of the organization).

14. G.A. Res. 1653 (XVI).

15. The 1961 resolution, for example, passed by a vote of 56 to 19, with 26 abstentions.

16. G.A. Res. 33/71B, Dec. 14, 1978 (emphasis added).

17. U.N. CHARTER art. 18 (referring to a majority or two-thirds majority “of the members present *and voting*.” (Emphasis added.) While one might argue that registering an abstention during the electronic voting process nevertheless constitutes a “vote” for purposes of Article 18, the Rules of Procedure of the General Assembly define this language of the Charter to exclude

abstentions. U.N. Doc. A/520/Rev.15, Rule 86 (1985), *quoted in* Paul C. Szasz, *Addendum: The Vote in the General Assembly*, 91 AM. J. INT'L L. 133 n.3 (1997).

18. "Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security. . . ." U.N. CHARTER art. 18(2).

19. Szasz, *supra* note 17, at 134.

20. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J., (ser. A), No. 10, at 18–19 (Sept. 7).

21. "[I]n international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception." *Military and Paramilitary Activities (Nicar. v. U.S.)* (Merits), 1986 I.C.J. 4 (June 27), para. 269.

22. *See, e.g., Nuclear Weapons* (written submissions of the United Kingdom at 21, and the Russian Federation at 5).

23. *Nuclear Weapons*, para. 22.

24. *Id.*, para. 52.

25. *Nuclear Weapons* (Declaration of President Bedjaoui at para. 13).

26. U.N. CHARTER art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

27. I am indebted to my colleague John Norton Moore for perceiving this reality more than a decade ago. *See* John Norton Moore, *Nuclear Weapons and the Law: Enhancing Strategic Stability*, in *NUCLEAR WEAPONS AND LAW* 54 (Arthur Selwyn Miller & Martin Feinrider eds., 1984). The Russian Government also emphasized the importance of distinguishing between offensive and defensive uses of nuclear weapons. *Nuclear Weapons*, "Written Statement and Comments of the Russian Federation on the Issue of the Legality of the Threat or Use of Nuclear Weapons," Moscow, June 16, 1995, at 5.

28. The writer is not suggesting that there are no dangers inherent in predicating world peace upon the hope that rational leaders will always be deterred from aggression by the knowledge that initiating a war might even unintentionally lead to nuclear holocaust. To be sure, this is a *frightening* thought. But one might also be concerned about legal efforts to undermine the ability of the world community to dissuade potential aggressors from initiating war in the first place. The impact of this decision on deterrence and peace is addressed *infra*, at notes 127–160 and accompanying text.

29. *See, e.g., infra* note 165 and accompanying text.

30. "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." I.C.J. STAT. art. 65(1) (emphasis added).

31. *See infra* notes 127–188 and accompanying text.

32. This is true unless the parties to a contentious case elect to submit a dispute for the Court to decide *ex aequo et bono* pursuant to Article 38(2) of the I.C.J. Statute.

33. *Nuclear Weapons*, para. 18.

34. *See* Schmitt, *supra* note 7, at 108.

35. *Nuclear Weapons*, para. 86.

36. *Id.*, paras. 37–39.

37. *See, e.g., id.* paras. 22, 85, 86 ("None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints.").

38. *Id.*, paras. 24–25.

39. *Id.*, paras. 27–33.

40. *Id.*, para. 55 (“The practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.”).

41. *Id.*, para. 26.

42. These are discussed in *id.*, paras. 58 & 59. For the text and background to some of these instruments, see U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS (1996). For an excellent summary of international agreements declaring certain regions to be “nuclear-free zones,” see Mark E. Rosen, *Nuclear-Weapon-Free Zones*, NAVAL WAR C. REV., Autumn 1996, at 47–55.

43. *Nuclear Weapons*, para. 62.

44. *Id.*, para. 62.

45. *Id.*, paras. 79, 83.

46. Indeed, as the Russian Government was quick to point out, the World Health Organization virtually conceded the lack of a customary ban in noting that “over the last 38 years marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons.” *Quoted in Nuclear Weapons*, “Written Statement and Comments of the Russian Federation on the Issue of the Legality of the Threat or Use of Nuclear Weapons,” Moscow, June 16, 1995, at 17. The Russians also noted that one of the reasons States are negotiating various international agreements placing limits on certain deployments or uses of nuclear weapons is because they recognize that there is no established customary norm, which, if it existed, would make the treaties unnecessary. *Id.* at 7.

47. *Nuclear Weapons*, para. 67.

48. Decisions of the General Assembly do have legal effect in certain specified areas, such as in setting the contributions to be paid each year by member States.

49. *Nuclear Weapons*, para. 71.

50. This may be optimistic. While one would hope that no government would contemplate using a nuclear weapon against its own nationals, the same thing might have been said about the use of other weapons of mass destruction until Saddam Hussein actually did so.

51. *Nuclear Weapons*, para. 50.

52. While activist scholars have in recent years produced a number of books and articles arguing that there is a “fundamental need to erect an international legal structure” to outlaw nuclear weapons, or calling for “an effort to create a legal regime for the reduction and elimination of nuclear weapons” as a “high priority,” and a relatively small number assert that existing treaties *already* effectively outlaw any threat or use of nuclear weapons, there is certainly no consensus among “the most highly qualified publicists of the various nations” that international custom already imposes a *per se* ban on the threat or use of nuclear weapons. See, e.g., ELLIOTT L. MEYROWITZ, PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW 197, 204, 205 (1990); NUCLEAR WEAPONS AND LAW 5–6 (Professor Richard B. Builder), 52 (Professor John Norton Moore), & 58 (Professor Harry Almond) (Arthur Selwyn Miller & Martin Feinrider eds., 1984); and Lori Fisler Damrosch, *Banning the Bomb: Law and Its Limits*, 86 COLUM. L. REV. 653, 667 (1986).

53. *Nuclear Weapons* (Dissenting Opinion of Vice-President Schwebel at 13).

54. *Nuclear Weapons*, para. 105 (2)(A).

55. *Id.*, para. 105(2)(C).

56. *Id.*, para. 105(2)(D).

57. See, e.g., *Nuclear Weapons*, “Written Comments of the Government of the United States of America on the Submissions of Other States,” June 20, 1995, at 34 (“The United States

has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare.”).

58. *Nuclear Weapons*, para. 105(2)(B).

59. See *supra* note 24 and accompanying text.

60. *Nuclear Weapons*, para. 105(2)(E).

61. “All questions shall be decided by a majority of the judges present.” I.C.J. STAT. art. 55(1).

62. *Id.*, art. 55(2).

63. *Id.* (Declaration of President Bedjaoui), para. 19. One might have thought that slavery, torture, or genocide might better qualify as “the ultimate evil.”

64. I.C.J. STAT. art. 68.

65. It is not here suggested that the Court should alter its own procedural rules from case to case, but rather that a reasonable argument can be made that tie votes in connection with advisory opinions do not necessarily need to be artificially “broken” by permitting one judge to vote twice. Contentious cases may pertain to impassioned disputes which, if left unresolved, might lead to unpleasantness and even hostilities. A just and impartial resolution of such disputes may be important, and if dispassionate experts are evenly divided on which party is in the legally superior position, and a compromise solution is impractical, it may even be useful (and fair) to essentially have the Court “flip a coin” to resolve the matter. A United Nations agency seeking a nonbinding advisory opinion could presumably adjust to the reality that the members of the World Court are evenly divided upon a legal question.

66. Implicit or explicit here would be the point that if a “nuclear weapon” existed or was developed that either lacked, or greatly reduced, the devastating characteristics normally associated with such weapons, a different conclusion might result from the application of the governing legal principles to the facts of that specific weapon and the circumstances in which it was being threatened or used.

67. CHARLES DICKENS, *OLIVER TWIST* 354 (Kathleen Tillotson ed., Oxford Univ. Press 1966). See *infra* note 198 and accompanying text.

68. *Nuclear Weapons*, para. 96 (emphasis added).

69. U.N. CHARTER art. 51.

70. 95 CONG. REC. 8892 (1949) (statement of Sen. Vandenberg).

71. THE CHARTER OF THE UNITED NATIONS: HEARINGS BEFORE THE SENATE COMM. ON FOREIGN RELATIONS, 79th Cong., 1st Sess. 349–350 (1945) (statement of John Foster Dulles, official adviser to United States delegation at San Francisco). The Russian Government noted in its written statement to the Court that “the Charter does not impair in any sense the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations. . . .” Written Statement and Comments of the Russian Federation on the Issue of the Legality of the Threat or Use of Nuclear Weapons, Moscow, June 16, 1995, at 8.

72. This translation was confirmed by the Russian Federation Mission to the United Nations in New York by telephone.

73. When questions were raised about whether the Kellogg-Briand Pact would restrict the right of States to use force in self-defense, the United States sent a diplomatic note to all countries being invited to sign the treaty which read in part: “There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. . . . Express recognition by treaty of this *inalienable right*, however, gives rise to the same difficulty

encountered in any effort to define aggression.” Quoted in DOCUMENTS ON NATIONAL SECURITY LAW 139 n.2 (John Norton Moore, Guy B. Roberts & Robert F. Turner eds., 1995) (emphasis added).

74. *Nuclear Weapons* (Separate Opinion of Judge Fleischhauer at 3).

75. *Id.* (Declaration of President Bedjaoui at para. 22).

76. The United Nations was established in the final months of World War II for the primary purpose of avoiding World War III, and the very first purpose identified in Article I is “to take effective collective measures for the prevention and removal of threats to the peace. . . .” U.N. CHARTER art. I, sect. 1.

77. See *supra* note 32 and accompanying text.

78. Consider this excerpt from the Declaration of President Bedjaoui: “Humanity is subjecting itself to a perverse and unremitting nuclear blackmail. The question is how to put a stop to it. The Court had a duty to play its part, however small, in this rescue operation for humanity. . . . This very important question of nuclear weapons proved alas to be an area in which the Court had to acknowledge that there is no immediate and clear answer to the question put to it. It is to be hoped that the international community . . . will endeavour as quickly as possible to correct the imperfections of an international law which is ultimately no more than the creation of the States themselves. The Court will at least have had the merit of pointing out these imperfections and calling upon international society to correct them.” *Nuclear Weapons* (Declaration of President Bedjaoui at paras. 6, 8).

79. The Court also sought to narrow this right in the *Paramilitary Activities Case*. See Robert F. Turner, *Peace and the World Court*, 20 VAND. J. TRANS. L. 53, 69–70 (1987).

80. The Court elected not to address the lawfulness of a proportional use of nuclear weapons as a belligerent reprisal to an armed attack with weapons of mass destruction. *Nuclear Weapons*, para. 47.

81. Treaty on the Non-Proliferation of Nuclear Weapons, signed on July 1, 1988, 21 U.S.T. 483.

82. U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS: TEXTS AND HISTORIES OF THE NEGOTIATIONS 93–94 (1996).

83. *Nuclear Weapons* (Dissenting Opinion of Judge Oda at 29).

84. *Nuclear Weapons*, para. 105(2)F.

85. This point has been observed by commentators and was also noted in *Nuclear Weapons* (Minority Opinion of Vice President Schwebel at 13; Separate Opinion of Judge Fleischhauer at 4).

86. G.A. Res. 51/45 M, Dec. 10, 1996 (adopted by a vote of 115–22–32) (emphasis added).

87. Treaty on the Non-Proliferation of Nuclear Weapons, signed on July 1, 1988, 21 U.S.T. 483.

88. *Nuclear Weapons*, paras. 99–100 (emphasis added).

89. If the Court perceives a legal duty to *conclude* an agreement, it presumably must be able to articulate at least the basic provisions of that agreement. Were it nothing more than an agreement to destroy all of their nuclear or other weapons, that might be manageable; but Article VI speaks in terms of attempting to negotiate “effective measures . . . under strict and effective international control.” (Emphasis added.) Where is the Court to turn in ascertaining a set of objective treaty terms to accomplish this goal? Can anyone say with a straight face that the States which ratified the NPT would have done so had they been informed that the World Court would arbitrarily impose a set of terms to satisfy the “strict and effective international control” requirement of Article VI—terms which would either be extremely intrusive on traditional

principles of national sovereignty or would likely prove ineffective in safeguarding the security of those States? Such an idea is simply not credible.

90. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), 8 I.L.M. 679 (1969).

91. Article 2(4) of the UN Charter would prohibit States from attempting to coerce other States to sign an agreement (which would in any event be void *ab initio* under Article 52 of the Vienna Convention). Since it is axiomatic that no "agreement" can exist without the consent of all parties, if a State has a legal obligation to conclude an unspecified agreement it is presumably at the mercy of the other party or parties.

92. Article X of the NPT provides, *inter alia*: "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. . . ."

93. Tacna-Arica Question (Chile v. Peru), 2 R.I.A.A. 921, 926 (1925). For a useful discussion of this and other international cases of relevance, see Martin A. Rogoff, *The Obligation to Negotiate in International Law*, 16 MICH. J. INT'L L. 141 (1994).

94. 2 R.I.A.A. 929-930.

95. Railway Traffic Between Lithuania and Poland, Oct. 15, 1931, PCIJ (ser. A/B), No. 42, at 108.

96. *Id.*

97. *Id.* at 116 (emphasis added).

98. International Status of South-West Africa, 1950 I.C.J. 128.

99. *Id.* at 184 (dissenting opinion of Judge Alvarez) (emphasis added).

100. Graeco-German Arbitration, 19 R.I.A.A. 55 (1990); 47 INTERNATIONAL LAW REPORTS 452-53 (E. Lauterpacht, ed. 1974).

101. 47 INT'L L. REP'T at 453.

102. Quoted in Ulrich Beyerlin, *Pactum de Contrahendo, Pactum de Negotiando*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 854, 858 (1997).

103. I.C.J. STAT. art. 38(3).

104. LORD MCNAIR, THE LAW OF TREATIES 27, 29 (1986). See also, MAX SØRENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 678-679 (1968) (emphasis added).

105. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 328 (1990).

106. *Id.* at 330.

107. Convention on the Law of Treaties, *supra* note 90, art. 32.

108. 2 MOHAMED I. SHAKER, THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION 1959-1979, at 566 (1980).

109. *Id.* at 569-570.

110. *Id.* at 570.

111. *Id.* at 571 (emphasis added).

112. *Id.* at 567 (italicized emphasis added) (quoting U.S. negotiator Gerard Smith.) Dr. Shaker notes further that "[s]ome countries took refuge in the UN General Assembly resolution 2373(XXII) commending the final draft of the NPT, [and] interpreting it as laying upon the nuclear-weapon States a solemn obligation to agree on further constructive measures of disarmament over and above the provisions of Article VI of the NPT." *Id.* at 572. One might note that: (1) this is a much narrower "obligation" than that held by the World Court to exist in the *Nuclear Weapons* advisory opinion; (2) the United States, for its part, has in fact agreed to a wide range of "further constructive measures of disarmament" through the SALT and START

process and through various multilateral treaties; and (3) resolutions of the UN General Assembly are not binding as a source of treaty interpretation.

113. See, e.g., *Nuclear Weapons*, “Statement of the Government of the United Kingdom, June 1995,” at 53.

114. I.C.J. STAT. art. 68 (emphasis added).

115. *Id.*, art. 53.

116. *Id.*, art. 49.

117. *Id.*, art. 50.

118. “The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances . . . has indicated what . . . would be the precise circumstances justifying such use. . . .” *Nuclear Weapons*, para. 94.

119. *Nuclear Weapons* (dissenting opinion of Judge Higgins at para. 9). For similar observations made more than a dozen years earlier, see W. Michael Reisman, *Deterrence and International Law*, in *NUCLEAR WEAPONS AND THE LAW*, *supra* note 27, at 129, 131–132; and John Norton Moore, *Nuclear Weapons and the Law: Enhancing Strategic Stability*, in *id.* at 51, 54–55.

120. See, e.g., OFFICE OF NAVAL INTELLIGENCE, *WORLDWIDE SUBMARINE CHALLENGES* 16 (1997).

121. I have chosen to use this older missile because its characteristics are better known than the newer SS-NX-28 that is reportedly being built for the new *Borey*-class submarines. While the *Borey* is expected to carry “at least 12 strategic missiles,” their characteristics and payload are not in the public domain. *Id.*

122. Robert F. Turner, *Killing Saddam: Would It Be a Crime?* WASH. POST, Oct. 7, 1990 at D1.

123. It has been widely reported that Saddam has constructed a number of hardened underground sites to protect him from personal risk. The world community has now affirmed that aggressive war is a criminal act *erga omnes*, and even if one assumed that a deep-penetrating small nuclear warhead would in some settings cause collateral damage claiming hundreds and perhaps thousands of innocent lives, this may be more acceptable than a prolonged conventional conflict in which hundreds of thousands or even millions of soldiers and noncombatants are slaughtered. Further, when the regime elite in question has the capability of unleashing weapons of mass destruction on innocent civilians in other countries, these risks must be balanced against anticipated collateral damage from a surgical strike against the aggressor regime elite. Each setting must obviously be evaluated in the context of all of the available information; but the idea that international law prohibits even threatening to use such a weapon to destroy the leadership of an aggressor State in an effort to deter the use of weapons of mass destruction against millions of innocent civilians is without foundation (see *infra*, notes 197-198 and accompanying text). To be sure, the risks of collateral damage must always be considered and might often preclude the actual use of such a weapon; but there is no *per se* ban on the threat of such use as an element of deterrence of international aggression.

124. The terrorists in this setting made no threat to occupy the United States or change even its form of government—and the Cambodian tragedy of two decades ago has demonstrated that a country might lose nearly a third of its population to tyranny and still “survive” as a State.

125. There is no *stare decisis* rule for the World Court. Even in contentious cases, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” I.C.J. STAT. art. 59.

126. UN CHARTER art. 92.

127. *Id.*, pmbl.

128. ELLIOTT L. MEYROWITZ, *PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW* 208 (1990).

129. *Id.* at 204.

130. *Id.* at 206.

131. *Id.* at 202.

132. JOHN ELLIS, *WORLD WAR II: A STATISTICAL SURVEY* 253 (1993).

133. R.J. RUMMEL, *THE MIRACLE THAT IS FREEDOM* 3 (1995).

134. See, e.g., BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1993); R.J. RUMMEL, *POWER KILLS: DEMOCRACY AS A METHOD OF NONVIOLENCE* (1997) and other works by this author; and Part IV of *APPROACHES TO PEACE: AN INTELLECTUAL MAP* (W. Scott Thompson et al. eds., 1991).

135. Particularly insightful on these issues is the work of my colleague, Professor John Norton Moore, who co-teaches a seminar with me at the University of Virginia School of Law on "War and Peace." While much of his work is still unwritten, a useful summary of some of his conclusions may be found in John Norton Moore, *Toward a New Paradigm*, 37 VA. J. INT'L L. 811 (1997).

136. See, e.g., Secretary of Foreign Affairs Thomas Jefferson's letter to James Monroe, July 11, 1790, in 17 PAPERS OF THOMAS JEFFERSON 25 (Julian P. Boyd ed., 1965) ("Whatever enables us to go to war, secures our peace.").

137. "If you desire peace, prepare for war." FLAVIUS VEGETIUS RENATUR, *EPITOMA RE MILITARIS*, *Prologium* at 3 (380 AD).

138. See, e.g., DONALD KAGAN, *ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE*, chs. 2 & 4 (1995).

139. *Id.* at 302.

140. *Id.* at 351.

141. *Id.* at 359.

142. *Id.* at 360–361.

143. *Id.* at 394, 412.

144. As a junior naval officer nearly three decades before becoming Chairman of the Joint Chiefs of Staff, Admiral Thomas Moorer took part in debriefing Japanese leaders at the end of World War II. Conversation with the writer.

145. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061.

146. The Convention on the Prohibition, Production, Stockpiling, and Use of Chemical Weapons, *opened for signature* Jan. 13, 1993, U.N. GAOR, 47th Sess., Supp. No. 27, U.N. Doc. A/47/27/Appendix 1 (1992), 32 I.L.M. 800 (1993).

147. U.N. CHARTER art. 2, para. 4, quoted *supra* at note 26.

148. Burns H. Weston, *Law and Alternative Security: Toward a Nuclear Weapons-Free World*, 75 IOWA L. REV. 1077, 1087 (1990).

149. *Id.* at 1077.

150. See *infra*, notes 166–170 and accompanying text.

151. While maintaining national credibility generally militates against making threats a State is unwilling to carry out, when the stakes involve trying to deter a possible chemical, biological, or nuclear attack, there may well be settings where a country will elect to *threaten* a belligerent reprisal which it might ultimately decide not to actually carry out. Like "bluffing" in poker, it is seldom useful to gain a reputation for not being able or willing to back up words with deeds; and in the war-peace setting this can be especially costly in terms of undermining

deterrence. For this reason, the assertion in some recent autobiographical accounts of the 1991 Gulf War that the United States had decided *in advance* to strongly imply that Iraqi use of weapons of mass destruction would be decisively countered with American nuclear weapons, but not to use such weapons under any circumstances, is unfortunate. The policy itself made imminent sense, but it should have remained a secret. The next time the United States finds it necessary to make such a threat, it may prove to be far less credible. In the writer's view, a threat of belligerent reprisal by nuclear weapons as a means of deterring an aggressive chemical, biological, or nuclear attack is neither contrary to existing *jus ad bellum* nor with any established *jus in bello* principle. To be sure, it may raise the anxiety level of a tyrant contemplating aggression, but that is one of the objectives of any deterrence policy.

152. *Id.* at 1087.

153. *Id.* at 1088.

154. Treaty on Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, T.I.A.S. No. 796, 94 L.N.T.S. 57, *reprinted in* NATIONAL SECURITY LAW DOCUMENTS, *supra* note 73, at 139.

155. Japan ratified the treaty on July 24, 1929.

156. Germany ratified the treaty on March 2, 1929.

157. The unwillingness of the international community to respond seriously to the Japanese invasion of Manchuria in 1930, and the Italian invasion of Ethiopia in 1936, demonstrated the toothless character of both the League of Nations and the Kellogg-Briand Pact. In a not dissimilar manner, the world community's failure to respond seriously to Iraq's invasion of Iran in 1980 and its subsequent use of prohibited chemical weapons likely contributed to the decision to invade Kuwait in August 1990.

158. See *supra* note 63 and accompanying text.

159. This is not to say that there are no weapons which might be characterized as "immoral" or even "evil." While this writer believes the better approach is to ascribe moral content to human actors, he might not quarrel with the conclusion that certain weapons may be incapable of being used in a moral manner—and thus their creation may be an immoral act. However, if they are created not to facilitate aggression and the painful slaughter of the innocent, but rather to deter the use of such weapons by others, even chemical weapons may serve a moral value. Consider, for example, the role played by Allied chemical weapons during World War II in dissuading Hitler from making use of the Nazi stockpile of such weapons.

160. MEYROWITZ, *supra* note 52, at 201.

161. *Id.* at 207.

162. SUN TZU, THE ART OF WAR 77 (Samuel B. Griffiths ed., 1963).

163. *Nuclear Weapons* (Oral Statement of State Legal Adviser Conrad Harper (U.S.), in Verbatim Record, Public Sitting, Wednesday, Nov. 15, 1995, CR 95/34, at 68).

164. *Nuclear Weapons* (Oral Statement of Sir Nicholas Lyell (UK) in Verbatim Record, Public Sitting, Wednesday, Nov. 15, 1995, CR 95/34, at 22-23).

165. *Nuclear Weapons* (dissenting opinion of Judge Higgins at 8).

166. R. Jeffrey Smith, *U.N. Says Iraqis Prepared Germ Weapons in Gulf War; Baghdad Balked, Fearing U.S. Nuclear Retaliation*, WASH. POST, Aug. 26, 1995, at A1, *quoted in* *Nuclear Weapons* (dissenting opinion of Vice-President Schwebel at 10-11).

167. *Quoted in* *Nuclear Weapons* (dissenting opinion of Vice-President Schwebel at 10) (emphasis added).

168. Judge Schwebel quotes from the writings of former U.S. Secretary of State James Baker to establish that the United States "purposely left the impression that the use of chemical or biological agents by Iraq could invite tactical nuclear retaliation." *Id.*

169. *Id.* One can be pleased that the United States made this decision and at the same time alarmed that it has been made public in the *memoirs* of key players and in other accounts of the conflict. Presumably it will be more difficult to deter the use of weapons of mass destruction against U.S. troops in any future conflicts because of the reports that the effective 1991 threat was merely a “bluff.” See *supra* note 151.

170. *Nuclear Weapons* (dissenting opinion of Vice-President Schwebel at 12).

171. The reference is to the *Paramilitary Activities* case, *supra* note 21 and accompanying text. The writer served as Principal Deputy Assistant Secretary of State for Legislative Affairs at the time, and because of his background, both in international law and with the intelligence program being examined by the Court (in an earlier position as Counsel to the President’s Intelligence Oversight Board at the White House), he was asked to serve on the interagency group that ultimately (over the writer’s strong objection) recommended that the United States withdraw its acceptance of the Court’s jurisdiction under Article 36(2) of the ICJ *Statute*. During this process, the writer tried in vain to persuade Intelligence Community officials to declassify some of the powerful evidence that had persuaded the Kissinger Commission, the House and Senate intelligence committees, and various other groups, that the United States was in fact responding defensively to an effort by Nicaragua to overthrow neighboring governments.

172. *Nuclear Weapons* Statement of the Government of the United Kingdom, June 1995, at 52.

173. See, e.g., *Nuclear Weapons*, para. 35.

174. Arthur G. Gaines, Jr., *Comment: The Environmental Threat of Military Operations*, in PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT 144 (Richard J. Grunawalt, John E. King & Ronald S. McClain eds., 1996).

175. Admittedly, such an effort might well have proven unsuccessful given the secrecy which usually surrounds such programs.

176. *Nuclear Weapons* (Declaration of President Bedjaoui at para. 20).

177. Mark Thompson, *Are the Smart Bombs Really Smarter Now?* TIME, Feb. 23, 1998, at 44, available at 1998 WL 7694461.

178. *Id.*

179. The laser-guided GBU-28 is reported to be “the most potent nonnuclear weapon the U.S. has for destroying deeply buried targets.” See David A. Fulghum, *Saudi Arabia Blocks USAF Warplane Shift: Coalition Disagreement Pushes Military Planners to Consider a Heavier Reliance on Naval Forces*, AVIATION WEEK & SPACE TECH., Feb. 16, 1998, at 22, available at 1998 WL 8142470.

180. The GBU-37, reported to have become operational in early 1998, is designed to work with the B-2 bomber’s GPS-aided weapons guidance system. *Id.*

181. *Id.* (Quoting Retired Air Force General John M. Loh).

182. *U.S. Will Not Be Outsmarted In Weapons Technology*, DEFENSE WEEK, Mar. 2, 1998 at 1, 14, available at 1998 WL 9046910.

183. An unidentified “briefing official” was quoted in *Aviation Week* as saying that the B-2 bomber “can carry everything from the 5,000 pounder on down.” AVIATION WEEK, *supra* note 171.

184. William M. Arkin, *What’s “New”?* BULLETIN OF THE ATOMIC SCIENTISTS, Nov. 21, 1997, at 22, available at 1997 WL 9509063.

185. I have in mind in particular the group of sixty generals and admirals from around the world who in December 1996 issued a declaration calling for the gradual destruction of all nuclear weapons. See, e.g., R. Jeffrey Smith, *Retired Nuclear Warrior Sounds Alarm on Weapons*, WASH. POST, Dec. 4, 1996, at A1.

186. See, e.g., GEN. LARRY D. WELCH, JOHN J. MCCLOY ROUNDTABLE ON THE ELIMINATION OF NUCLEAR WEAPONS 6 (1998).

187. Having spent two tours as an Army officer in South Vietnam, the writer has no misconceptions about the horror and human tragedy of such “peripheral” events. See, e.g., NATIONAL SECURITY LAW 177 (Stephen Dycus et al. eds., 1990). But conflicts like Korea, Vietnam, and Afghanistan did not approach the global horrors of World War II, and far less a nuclear or conventional World War III.

188. 26 PAPERS OF THOMAS JEFFERSON 392 (John Catanzariti ed., 1995).

189. John Stuart Mill, *The Contest in America*, 1 DISSERTATIONS AND DISCUSSIONS 26 (1868).

190. Quoted *supra* note 87 and accompanying text.

191. Richard B. Bilder, *Nuclear Weapons and International Law*, in NUCLEAR WEAPONS AND LAW, *supra* note 27, at 3.

192. One of the military targets bombed by the coalition was exhibited to the press with a newly painted sign (in English) crudely marked: “Baby Milk Factory.” See, e.g., Melissa Healey & James Gerstenzang, *Iraq Says It Has 11,131 Chemical Warheads in Stock Military*, L.A. TIMES, Apr. 20, 1991, available in 1991 WL 2295201; Walter Putnam, *Iraq Admits Experiments with Anthrax, Botulin Toxin*, A.P. Aug. 6, 1991, available in 1991 WL 6195955.

193. To set the stage for such accommodations, one might expect States wishing to undermine the inspection regime to intentionally plant information to encourage their adversaries to demand inspections of politically-sensitive sites (e.g., religious or cultural landmarks)—and the resulting negative results will be used as evidence to show both that the State in question is being “picked on” unfairly and that the inspection regime is “out of control” and must be curtailed.

194. Harry H. Almond, Jr., *Deterrence and a Policy-Oriented Perspective on the Legality of Nuclear Weapons*, in NUCLEAR WEAPONS AND LAW, *supra* note 27, at 57, 68.

195. See, e.g., WELCH, *supra* note 136, at 13–14.

196. See *supra* note 82 and accompanying text.

197. *Nuclear Weapons*, para. 47.

198. It is of course conceivable that under certain circumstances such a threat might foreseeably have consequences beyond an enhanced level of anxiety for the aggressor’s military command structure (“They can destroy this hardened bunker with their new deep-penetrating B61-11 warhead!”)—such as producing widespread panic leading to the trampling of noncombatants near a threatened target—and such a possible reaction ought to be considered in connection with any such threat; but as a general principle, international humanitarian law is concerned with consequences of the conduct of hostilities and is not offended by mere threats.

199. While customary international law is just as “binding” as conventional law, neither category normally binds States which have not consented to the rule in question. Thus, except when they incorporate rules of such established character and fundamental importance that they have attained the character of preemptory norms, treaties do not create obligations for non-parties. While a State may by acquiescence become bound by an emerging customary norm (conducting itself in such a manner to justify an implication of consent), a State which persistently objects or through its behavior demonstrates its unwillingness to consent to an emerging norm is not normally bound thereby.

200. This is not to say that it is *per se* unlawful for any such target to be destroyed or injured by an otherwise lawful use of a weapon.

201. U.S. Army Field Manual No. 27–10, for example, provides that “The use of explosive “atomic weapons,” whether by air, sea, or land forces, cannot as such be regarded as violative of

international law in the absence of any customary rule of international law or international convention restricting their employment." DEPT OF THE ARMY, THE LAW OF LAND WARFARE, para. 35 (1956).

XV

Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said

George K. Walker

A DEBATE CONTINUES on whether anticipatory self-defense is permitted in the era of the UN Charter.¹ Two recent commentators say that States need not await the first blow but may react in self-defense,² provided principles of necessity and proportionality are observed. They differ, however, on when States may claim anticipatory self-defense.³ This is not surprising, since others seem to change views.⁴ Still others take no clear position.⁵

Most anticipatory self-defense claims since World War II have been asserted by States responding unilaterally to another country's actions. Claims of this nature are more likely to be raised in the future.⁶ The UN Charter, Article 51, declares in part that "Nothing in the . . . Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a [UN] Member . . . until the Security Council has taken measures necessary to maintain international peace and security." This article proposes to analyze the alternative to individual self-defense, i.e., collective security pursuant to treaty.

After examining nineteenth century international agreements and those of the first half of this century, the scope of collective self-defense in Charter-era treaties

will be analyzed. The inquiry for these agreements is whether a right of anticipatory collective self-defense is stated in them, paralleling States' right to claim individual anticipatory self-defense. If there is a right of anticipatory collective self-defense, what is the scope of that right, and what are the limitations on it?

If the Peace of Westphalia (1648)⁷ began the nation-state system, the Congress of Vienna (1815)⁸ started the modern movement toward collective security.⁹ It is from this benchmark that Part I examines treaty systems through World War I. Part II analyzes treaty systems during the era of the Covenant of the League of Nations (1920–46),¹⁰ and the Pact of Paris (1928)¹¹ through World War II. Part III examines the drafting of the Charter and court decisions, including the Nuremberg International Military Tribunal, immediately following World War II. Part IV examines collective self-defense treaties concluded since 1945. Part V offers projections for the future of anticipatory collective self-defense in the Charter era.

In terms of treaties and practice affecting the United States, between the alliance with France¹² that helped support a successful Revolution and the Declaration of Panama,¹³ the United States did not ratify a single mutual self-defense agreement. The worldscale record has been different, but lack of U.S. participation in this kind of arrangement may explain why many in the United States are not familiar with the concept of collective self-defense, and particularly anticipatory collective self-defense. Because there has been a concept of anticipatory collective self-defense for nearly two centuries, including the 50 years that the Charter has been in force, this form of joint response by States appears to have attained the status of a customary norm.

I. From the Congress of Vienna to World War I

Within months after an ad hoc alliance¹⁴ defeated Napoleon I at Waterloo and established the Congress system,¹⁵ the principal powers began building alliances to assure peace. Austria, Prussia, and Russia pledged in the Holy Alliance (September 1815):

Conformably to . . . Holy Scriptures, which command all men to consider each other as brethren, the Three contracting Monarchs will remain united by . . . a true and indissoluble fraternity, and considering each other as fellow countrymen, they will, on all occasions and in all places, lend each other aid and assistance; and, regarding themselves toward their subjects and armies as fathers of families, they will lead them, in the same spirit of fraternity with which they are animated, to protect Religion, Peace, and Justice.¹⁶

Although at least six European states acceded to the Alliance, Great Britain's Prince Regent did not;¹⁷ the result was a Treaty of Alliance and Friendship in November 1815 to continue the earlier alliance's collective security policy.¹⁸ Besides confirming standing forces in France, the allies agreed to "concert together, without loss of time, as to the additional . . . troops to be furnished . . . for the support of the common cause; and they engage to employ, in case of need, the whole of their forces . . . to bring the War to a speedy and successful termination, reserving to themselves to prescribe, by common consent, such conditions of Peace as shall hold out to Europe a sufficient guarantee against the recurrence of a similar calamity[,]” i.e., advent of another conquest. They also agreed to meet periodically to “consult . . . upon their common interests, and for the consideration of the measures which at each of those periods shall be considered the most salutary for the repose and prosperity of Nations, and for the maintenance of the Peace of Europe.”¹⁹

The Alliance, to which France was admitted as part of the Concert of Europe in 1818,²⁰ had two policies: periodic consultation to consider measures to help preserve peace, and commitment of forces to end any conflict that had ignited. The Alliance thus bespoke the collective self-defense concept and, depending on the nature of consultations and actions decided, a potential for anticipatory self-defense.²¹ An example of the latter occurred in 1848, when revolution in France accompanied transition to the Second Republic. Fearing a new war of French national liberation, Prussia put its Rhine troops on alert and Russia directed its armies to be ready for war. Tsar Nicholas was dissuaded from sending 30,000 to help Prussia, a move that might have resulted in war.²²

It was in this context that the right of anticipatory self-defense was formulated in the *Caroline Case* (1842), i.e., that a proportional anticipatory response in self-defense is admissible when the need is necessary, instant, overwhelming and admitting of no other alternative with no moment for deliberation.²³ The final requirement—no moment for deliberation—is not inconsistent with consultation clauses in the early treaties. States then and now may consult and decide to employ anticipatory collective self-defense as an option to a threat. Moreover, States then and now might agree that those countries claiming a right of anticipatory self-defense might thus respond as part of collective self-defense.

The Crimean War. The potential for reactive and anticipatory collective self-defense was stated again during the Crimean War (1854).²⁴ The war began when Russia occupied the Turkish principalities of Moldavia and Wallachia; Britain and France declared they

. . . [had] concerted, and will concert together, as to the most proper means for liberating the Territory of the Sultan from Foreign Invasion, and for accomplishing the object . . . [of reestablishing peace between Russia and Turkey and preserving the continent from "lamentable complications which . . . so unhappily disturbed the general Peace"]. . . . [T]hey engage to maintain, according to the requirements of the War, to be judged of by common agreement, sufficient Naval and Military Forces to meet those requirements, the description, number, and destination whereof shall, if occasion should arise, be determined by subsequent Arrangements.

They renounced "Acquisition of any Advantage for themselves" and invited other European powers to accede to the alliance.²⁵ Austria and Prussia tried to avoid participation in the war "and the dangers arising therefrom to the Peace of Europe"; they concluded a Treaty of Alliance, which, *inter alia*, said that "a mutual Offensive Advance is stipulated for only in the event of the incorporation of the Principalities, or . . . attack on or passage of the Balkans by Russia."²⁶ Later that year an alliance among Austria, Britain, and France attempted to protect Austria's occupation of the principalities against return of Russian forces. If war broke out between Austria and Russia, the three countries pledged their "Offensive and Defensive Alliance in the present War, and will for that purpose employ, according to the requirements of the War, Military and Naval Forces. . . ."²⁷ Similar terms appeared in an 1855 allied convention with Sardinia.²⁸ In 1855 Britain and France also pledged to "furnish . . . Sweden . . . sufficient Naval and Military Forces to Co-operate with the Naval and Military Forces of [Sweden to] . . . resist . . . Pretensions or Aggressions of Russia."²⁹ A treaty ring around Russia thus tightened.

Preparations for the Crimea expedition, noted in the Anglo-French treaty, were in the nature of anticipatory self-defense, and the Austro-Prussian alliance recognized a concept of "Offensive Advance," i.e., anticipatory action, if Russia moved through the Balkans; the parties would attack Russia only if Russia passed through territory close to Austrian borders. Similar concepts were recognized in the Austro-Anglo-French alliance and the Sardinia military convention. The Swedish treaty also provided for anticipation of Russian action.³⁰

A verbal agreement between France and Sardinia preceded the Franco-Austrian war (1858–59). It included a "defensive and offensive alliance," a French pledge to come to the aid of Sardinia if it or Austria declared war, and a statement that occupation of Italian territory, Austrian violation of existing treaties, "and other things of a similar kind" would cause a French war declaration.³¹ During the Franco-Prussian War (1870–71), the belligerents

agreed to cooperate with Britain to assure Belgian neutrality if it were threatened by an opponent.³² In both cases, the potential for action was great and could have included what would be considered anticipatory self-defense today. An example from the 1858-59 conflict was Napoleon III's hearing reports that Prussia was mobilizing six army corps "inclined him further to make peace. . . ."³³ The Franco-Sardinian understanding was also an example of an informal self-defense arrangement, made without benefit of a formal treaty. A similar instance came in the U.S. Civil War, when a Russian admiral confidentially advised U.S. Admiral David G. Farragut in 1863 that he had sealed orders to support the United States if it became involved in conflict with a foreign power (e.g., Britain or France) which supported the Confederacy, a war that never was.³⁴ This form of informal collective self-defense is available under the UN Charter, as will be seen.³⁵

In Latin America there was a counterpart conflict, the War of the Triple Alliance (1865–70); Argentina, Brazil and Uruguay signed an "offensive and defensive" alliance, claiming Paraguay had provoked war. At the same time, however, other Latin American countries signed defense alliances pledging consultation and mutual defense against an aggressor or any acts to deprive them of sovereignty and independence.³⁶ Western Hemisphere States, but not the United States, were thus negotiating the same kinds of treaties as in Europe.

The Treaty Map Up to World War I, 1871-1914. After the Franco-Prussian War ended,³⁷ agreements leading to the Triple Alliance (Austria-Hungary, Germany, Italy), and those resulting in the Entente of France and Russia and ultimately Great Britain, had examples of reactive or anticipatory self-defense. The 1907 Hague Conventions, still in force, would impose rules for war declarations³⁸ and forbid resort to war to collect contract debts,³⁹ but do not apply to the collective self-defense issue. The alliance systems continued to provide for collective self-defense and sometimes explicitly recognized anticipatory self-defense, e.g., resort to self-defense if an opponent mobilized. Taylor makes the point that these treaties, along with economic development on the Continent, gave Europe 34 years of peace.⁴⁰ Cannot the same be said about alliance systems⁴¹ and regional economic development treaties⁴² since World War II?

The Convention of Schonbrunn (1873) provided: if an "aggression coming from a third Power should threaten to compromise the peace of Europe, [the parties] mutually engage to come to a preliminary understanding . . . to agree as to the line of conduct to be followed in common." A special convention would be necessary to undertake military action.⁴³ In 1878 Britain concluded a

Defensive Alliance with Turkey aimed at Russian territorial interests in Turkey, promising to join Turkey to defend with force of arms.⁴⁴ In 1879 Austria-Hungary and Germany negotiated a Treaty of Alliance aimed at Russia. If Russia attacked either party alone or “by an active co-operation or by military measures which constitute a menace to the Party attacked,” the other had to assist “with the whole war strength of their Empire[.]”⁴⁵ It was “the first permanent arrangement in peace-time between two Great Powers since the end of the *ancien regime*.”⁴⁶ Two years later, the three empires were on the same side, pledging that if one party were at war with a fourth Great Power, the others would maintain “benevolent neutrality.”⁴⁷ At about the same time Chile fought Bolivia and Peru in the Pacific War, which resulted in loss of Bolivia’s coast and Peruvian territory; the defensive alliance between the two States pledged defense against “all foreign aggression” or acts designed to deprive a party of sovereignty and independence.⁴⁸

Treaties to isolate France began with the Treaty of the Triple Alliance (Austria-Hungary, Germany, Italy, 1882), “one of the most stable and important of the European alignments,” lasting until 1915.⁴⁹ If France attacked Italy, France attacked Germany, or if one or two signatories were attacked “without provocation,” and were at war with two or more other Powers, the other had to join the conflict.⁵⁰ Articles 4 and 5 provided:

[If] a Great Power nonsignatory to the . . . Treaty should threaten the security of the states of one . . . Part[y], and the threatened Party should find itself forced on that account to make war against it, the two others bind themselves to observe towards their Ally a benevolent neutrality. Each . . . reserves to itself, in this case, the right to take part in the war, if it should see fit, to make common cause with its Ally.

. . . If the peace of any . . . Part[y] should chance to be threatened under the circumstances foreseen by . . . Articles [1-4], the . . . Parties shall take counsel together in ample time as to the military measures to be taken with a view to eventual co-operation.

Secrecy was pledged;⁵¹ this was among many “secret” treaties of the era,⁵² which were not truly secret, being so only for specific terms. In their “secrecy” they were “engines of publicity.”⁵³

In 1883, Romania and Austria-Hungary agreed that if the other were attacked “without provocation,” an obligation would arise. If either were “threatened by an aggression under [these] . . . conditions,” the governments would confer, with a military convention to govern operations.⁵⁴ Germany acceded to this treaty, as did Italy.⁵⁵

The third Triple Alliance⁵⁶ resulted in the beginning of the Entente Cordiale, whose exchange of notes stated a Franco-Russian agreement that if “peace should be actually in danger, and especially if . . . [a] part[y] should be threatened with an aggression, the two parties undertake to reach an understanding on measures whose immediate and simultaneous adoption would be imposed upon the two Governments by the realization of this eventuality.”⁵⁷ A Military Convention followed in 1892, providing that if Triple Alliance forces or an Alliance State should mobilize, France and Russia, “at the first news of the event and without the necessity of any previous concert, shall mobilize immediately and simultaneously the whole of their forces and shall move them . . . to their frontiers” to attempt to force a two-front war. Respective general staffs would cooperate to prepare and facilitate execution of these measures.⁵⁸ These terms were generally not known, but most diplomats considered France and Russia partners.⁵⁹ Britain joined the Entente by separate arrangement with France (1904)⁶⁰ and Russia (1907)⁶¹ but signed no formal defense alliances, although Russia wanted them.⁶² Britain began unofficial military and naval conversations with France in 1906, however.⁶³

A 1904 Bulgar-Serb alliance “promise[d] to oppose, with all the power and resources at their command, any hostile act or . . . occupation” of four Balkan provinces; it was directed at Turkey. The alliance also pledged joint defense “against any encroachment from any source . . . on the present territorial unity. . . .” If either event happened, the allies would conclude a special military convention.⁶⁴ These countries negotiated the same arrangement in 1912, with a military convention.⁶⁵ Bulgaria also negotiated an alliance with Greece; it provided that if either “should be attacked by Turkey, either on its territory or through systematic disregard of its rights, based on treaties or on the fundamental principles of international law,” they would agree to assist each other.⁶⁶ In 1913 Greece and Serbia signed an alliance and military convention; if “one of the two . . . should be attacked without any provocation on its part,” the other would assist with all of its armed forces.⁶⁷

In 1911, despite reticence to commit in Europe,⁶⁸ Britain concluded a defensive alliance with Japan; the treaty had the almost standard articles for prior consultation, armed common defense upon unprovoked attack or aggressive action by a third State, with a military and naval arrangement to follow, and periodic military consultations.⁶⁹

Analysis. This labyrinth of agreements did not prevent, and may have contributed to,⁷⁰ the Great War. Neither the Hague ultimatum system,⁷¹ nor the language of these treaties, which pledged reactive self-defense but

occasionally contain a potential for anticipatory self-defense, could stop mobilizations and war declarations.⁷² It was applying military force and diplomacy, or failure to apply force and diplomacy properly through treaties,⁷³ and not provision for self-defense in them, which resulted in the cataclysm.

The treaties of 1815–1914 were not drafted with today's concepts of self-defense, anticipatory self-defense, or collective self-defense in mind. They have been superseded by the Pact of Paris insofar as they justify resort to offensive war as national policy,⁷⁴ and by the Covenant and the Charter as to their secrecy provisions.⁷⁵ They were conditioned by the 1907 Hague Conventions.⁷⁶ Nevertheless, several principles emerge. There was a concept of collective self-defense, multilateral and bilateral. Many treaties had general statements requiring prior consultation.⁷⁷ Although most spoke of reactive self-defense, i.e., awaiting a first attack before responding, consistent with today's restrictive view, some contemplated anticipatory response.⁷⁸

This is particularly true for the aftermath of the Napoleonic Wars, where the victors established the Congress system with a multilateral defense treaty incorporating consultation and anticipatory self-defense principles.⁷⁹ The Crimean War illustrates response to a regional conflict. States opposing Russia agreed on terms among themselves for prior consultation and to try to contain the conflict by warning Russia, at least on paper, of consequences of widening the war. Peripheral treaties, e.g., that with Sweden, were anticipatory in nature, warning Russia of consequences of wider action.⁸⁰ In a very rough sense, between the Congress and the Crimea systems, we have the forerunner of the treaty system in place since World War II—an overarching instrument like the Charter,⁸¹ regional multilaterals like the North Atlantic Treaty,⁸² and bilaterals⁸³ elsewhere around the world.

Like Charter-era commentators,⁸⁴ the record for anticipatory self-defense in the pre-World War I treaties is mixed. Unlike commentators who can only argue a position, treaty drafters who included anticipatory self-defense provisions laid groundwork for State practice⁸⁵ in that they could be involved as a source of law⁸⁶ if those treaties were carried out. If other agreements were fulfilled through anticipatory self-defense, a view that anticipatory self-defense was a feature of international law before 1914 was strengthened.

II. The Covenant of the League of Nations and the Pact of Paris

The League of Nations Covenant and the 1928 Pact of Paris, also known as the Kellogg-Briand Pact, were the principal governing instruments during the interwar years, 1920–39. These treaties, including the self-defense reservation

to the Pact of Paris and other agreements negotiated before World War II, and the views of commentators, demonstrate that anticipatory collective self-defense remained as a legitimate response under international law.

The Covenant of the League of Nations. The Covenant of the League of Nations, a part of the World War I peace treaties,⁸⁷ was treaty law by territorial application⁸⁸ to League Members'⁸⁹ colonies and dependencies for much of the Earth from 1920 through 1945. Major exceptions were: Germany, a member from 1926–35; Japan, a member from 1920–35; the USSR, a member from 1934–39; and the United States, which was never a member.

The Covenant's relatively weak principles for regulating use of force did not address self-defense issues directly. Its preamble declared that parties to the Covenant, "to achieve international peace and security . . . accept[ed] . . . obligations not to resort to war . . . [and] Agree[d] to [the] Covenant . . ." Covenant Article 10 provided: " . . . Members . . . undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members. . . . In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled." (The Council included the Principal Allied and Associated Powers from World War I—France, Great Britain, Italy, and Japan—and four more League Members.)⁹⁰ Article 11 provided for League action in case of war or threat of war:

1. Any war or threat of war, whether immediately affecting any . . . Members . . . or not, is . . . declared a matter of concern to the whole League, and [it] shall take any action . . . deemed wise and effectual to safeguard the peace of nations. [If] any such emergency should arise the Secretary-General shall on the request of any Member . . . forthwith summon a meeting of the Council.

2. It is also . . . the friendly right of each Member . . . to bring to the attention of the Assembly or . . . Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

The Assembly included representatives of all Members; the Secretary-General had functions similar to the UN Secretary-General.⁹¹ Members also agreed to resolve disputes by arbitration, judicial settlement or resolution by the Council or the Assembly.⁹² If a Member resorted to war, disregarding these covenants, it was "*ipso facto* . . . deemed to have committed an act of war against all other Members . . .," which would undertake economic and other sanctions, leaving

military options to Council recommendations.⁹³ The offending Member could not invoke treaties it did not register with the League, and the Assembly was charged with examining registered agreements for risks to peace.⁹⁴ The Covenant was silent on options if the Council did not recommend action, or if it did and Members did not comply.

The similarity of Covenant Articles 10–11 to Articles 1(1) and 2(4) of the UN Charter regarding threats to the peace or threats against any State might be noted:

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. . . .

Article 2

The Organization and its Members, in pursuit of the Purposes . . . in Article 1, shall act in accordance with the following Principles: . . .

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁹⁵

Besides providing for external aggression against Members' territorial integrity, Covenant Article 10 also referred to "threat or danger of such aggression." Article 11(1) declared of "war or threat of war, whether immediately affecting" a Member as League concern, and the League could take "any action" deemed wise and effectual to safeguard the peace of nations." Article 11(2) allowed a Member to bring forward "any circumstance whatever affecting international relations which threatens to disturb international peace. . . ."

The Covenant drafters thus had in mind more than war declarations or outbreak of war. Like the Charter a quarter century later, the Covenant contemplated action against threats or dangers of aggression, or threats of war, or "any circumstance whatever . . . threatening to disturb international peace." Article 16(1) declared that a Member's resort to war in violation of certain Covenant obligations would automatically result in that Member's action being "deemed . . . an act of war against all other Members. . . ." Under treaty

interpretation canons,⁹⁶ the Covenant, weak as it was in terms of enforcement, contemplated collective action to counter hostile intent and hostile action.

Although the Covenant did not mention individual or collective self-defense, other Treaty of Versailles provisions declared that Germany was forbidden to maintain or fortify certain parts of the banks of the Rhine. Maintaining armed forces, whether permanently or temporarily stationed there, or permanent mobilization works, was forbidden. If Germany violated these provisions, she would “be regarded as committing a hostile act against the Powers signatory [to] the . . . Treaty and as calculated to disturb the peace of the world.”⁹⁷ This was a statement of a potential for anticipatory collective self-defense. Unratified bilateral agreements between France and the United States, and France and Great Britain ancillary to the Treaty, confirm this view. These would have provided for Great Britain’s and the United States’ coming immediately to the aid of France if Germany committed “any unprovoked movement of aggression against her[.]” Because these agreements were effective only if Britain and the United States ratified respective bilaterals with France,⁹⁸ U.S. failure to ratify the Treaty⁹⁹ torpedoed the bilaterals, including the France-UK agreement that was otherwise in force, as well.¹⁰⁰ Nevertheless, use of “movement” in these treaties, and the Versailles Treaty language, shows that the treaty drafters considered anticipatory collective self-defense action as an option. Available evidence of the secret military convention between France and Poland (1921) could lead to a conclusion that it, too, contemplated anticipatory self-defense, as did the France-Czechoslovakia alliance (1924).¹⁰¹ On the other hand, eastern European States’ alliances creating the Little Entente provided for reactive self-defense.¹⁰²

In 1931 League Assembly reports (one of them adopted by the Assembly) confirmed that legitimate self-defense was not excluded in the Covenant prohibition on recourse to war.¹⁰³ Principal League Members were unable to accept a proposed Treaty of Mutual Guarantee, open to all States, where any party attacked would receive immediate, effective assistance from other parties in the same part of the world, or the Protocol of Geneva, which would have branded any State choosing war over arbitration of a dispute as the aggressor, unless the Council decided otherwise.¹⁰⁴ The right of self-defense became more explicit in reservations to the Pact of Paris and authoritative interpretation of the Pact.¹⁰⁵

Locarno, the Pact of Paris, and the Budapest Articles; Other Treaties. In 1925 five powers—Belgium, France, Germany, Great Britain, Italy—signed the Locarno Treaties. Belgium and Germany, and France and Germany, pledged

that they would not attack, invade, or resort to war against each other. This core Treaty of Mutual Guarantee stated exceptions for these undertakings: "legitimate defense" and the parties' action to settle a conflict or stop an aggressor if the League did not. Legitimate defense was defined as "resistance to a violation of the undertaking" not to attack or invade, or resistance to flagrant breach of the Versailles Treaty's demilitarization provisions, "if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone immediate action is necessary."¹⁰⁶ The Locarno treaties also created a system in the nature of collective self-defense.¹⁰⁷ The parties pledged to "collectively and severally guarantee . . . maintenance of the territorial *status quo* [of] . . . frontiers between Germany and Belgium and between Germany and France, and the inviolability of the said frontiers as fixed by" the Versailles Treaty.¹⁰⁸ The parties agreed to come immediately to the assistance of the target State.¹⁰⁹ To the extent that the Locarno parties agreed to act collectively for flagrant breaches of the Versailles Treaty, Locarno could be said to restate anticipatory collective self-defense, in that failure to maintain a demilitarized area or status could be a hostile threat to other states. Only five countries were formal parties, but when their colonial empires and associated states are considered, Locarno's territorial scope was quite great.¹¹⁰

Parties to the Pact of Paris (1928) renounced war as an instrument of national policy, agreeing to settle disputes by pacific means.¹¹¹ The Pact is still in force, partly superseded by the Charter,¹¹² with 69 parties by 1997.¹¹³ Treaty succession principles may apply it to more states.¹¹⁴ The Pact's principles became part of the Nuremberg Charter¹¹⁵ and Judgment,¹¹⁶ they were affirmed as customary law by unanimous UN General Assembly Resolution 95(1).¹¹⁷

Although the Pact did not address self-defense, an understanding promoted by the United States,¹¹⁸ to which 14 major signatories including the colonial powers¹¹⁹ agreed,¹²⁰ said the treaty did not affect the "inalienable" right of self-defense. The exchanged notes were "an authentic and binding commentary on and interpretation of the . . . Treaty."¹²¹ There was no specific reference to anticipatory self-defense or collective self-defense in the diplomatic correspondence, but Great Britain broadly claimed:

. . . [T]here are certain regions . . . the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the . . . Empire a measure of self-defense. It must be clearly understood that . . . Britain accept[s] the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect.¹²²

Britain referred to parts of its Empire, probably Egypt and the Persian Gulf, and perhaps other areas.¹²³ A few States objected to the UK note, the USSR stating that “the result would be that there would probably be no place left . . . where the Pact could be applied.”¹²⁴ Since the Commonwealth system included colonies, self-governing Dominions, India, and the Irish Free State,¹²⁵ the note may have reserved a right of self-defense for Britain to defend units of the Commonwealth and the Empire. Covenant provisions allowing League membership for colonies and Dominions¹²⁶ underscored a potential for collective self-defense based on these relationships.

The U.S. note, to which states had responded in general agreement, spoke of the “inherent” and “inalienable” right of self-defense.¹²⁷ That this continued the prior law, which included rights of anticipatory self-defense and collective self-defense, was apparent from treaties, State practice and judicial decisions between 1928 and World War II.

The Little Entente of Balkan states, following bilateral self-defense treaties in 1921,¹²⁸ negotiated its Pact of Organization in 1930, declaring its governing Council’s common policy would be inspired by, *inter alia*, the Covenant, the Pact of Paris, and the Locarno Treaties; the 1921 treaties were renewed indefinitely.¹²⁹ Since the Pact incorporated the Pact of Paris with its widely accepted self-defense reservation,¹³⁰ the presumption is that the Entente accepted the concept in its self-defense considerations. That the Entente may have contemplated anticipatory self-defense among its response options is further evidenced by its agreement with other area countries, which pledged reaction to “aggression,”¹³¹ otherwise not defined, since the original 1921 agreements pledged joint reaction to “unprovoked attack.”¹³² Whether aggression meant more, e.g., action short of attack, is not clear. However, citing the Pact of Paris indicates the Entente accepted anticipatory self-defense as a response option if it was part of that inherent right.

Although not forming an organization specifically for the purpose—the Pan American Union¹³³ was in place at the time—Western Hemisphere States, including the United States, negotiated agreements in 1936 to “supplement and reinforce” League efforts in seeking to prevent war.¹³⁴ These governments, besides reaffirming prior treaty obligations to settle international controversies between them by pacific means, also agreed to consult if there was a threat of war among them, subject to Member obligations under the Covenant. The Pact of Paris was among treaties whose obligations were confirmed.¹³⁵ While these treaties—still in force¹³⁶—do not cover a Hemisphere country’s war with a State outside the Americas, in reaffirming the Pact of Paris and its self-defense reservation,¹³⁷ they reinforce that law.

The 1937 Nyon Arrangement and the Agreement supplementing it¹³⁸ declared parties would defend merchant shipping and civil aircraft of any State attacked by surface ships, aircraft, or submarines in parts of the Mediterranean Sea.¹³⁹ The Arrangement, besides announcing that a submarine attacking vessels contrary to the 1930 London naval armaments treaty and its 1936 Protocol¹⁴⁰ would be attacked and if possible destroyed, also said parties' forces would attack "any submarine encountered in the vicinity of a position where a ship not belonging to either . . . conflicting Spanish parties [in the Spanish civil war] ha[d] recently been attacked in violation of the rules . . . in circumstances which give valid grounds for the belief that the submarine was guilty of the attack."¹⁴¹ Because of further submarine attacks on merchantmen, Nyon parties announced they would sink "any submarine found submerged" in Mediterranean Sea zones under their control.¹⁴²

The Arrangement as published and applied is an example of maritime anticipatory collective self-defense.¹⁴³ Nine states—several with no Mediterranean coastlines—agreed to protect shipping and aircraft, including their own. These states declared they would attack a submerged submarine near an attacked merchantman and later broadened Arrangement coverage to include submarines found submerged in their patrol areas. (Today it would be said that a submarine's being in the area is a manifestation of hostile intent, and the submarine is subject to destruction in anticipation of its potential for attacking merchant shipping in the future.) When Mediterranean maritime states cooperated under the Arrangement to suppress submarine attacks, they acted in anticipatory collective self-defense.

In 1934 the International Law Association had adopted the *Budapest Articles of Interpretation* of the Pact of Paris, which recited these principles:

- (2) A signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.
- (3) A signatory State which aids a violating State thereby itself violates the Pact.
- (4) In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or any rule of International Law, do all or any of the following things:—
 - (a) Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade, etc.;

- (b) Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent;
- (c) Supply the State attacked with financial or material assistance, including munitions of war;
- (d) Assist with armed forces the State attacked.¹⁴⁴

Although some States and commentators noted when the Articles were approved that no State had adopted them as policy, it has been argued that the Articles and the 1939 Harvard Draft Convention on Rights and Duties of States in Case of Aggression¹⁴⁵ legitimated 1939–41 U.S. aid to the Allies in World War II before the United States entered the conflict.¹⁴⁶

If Article 4(c) supplied legal backbone for Lend-Lease and similar arrangements while the United States was not at war, Article 4(d) was a basis for collective self-defense and anticipatory self-defense in particular. Besides aiding the Allies materially, the United States began escorting war materials convoys to the middle of the Atlantic Ocean, turning over escort duties to the Royal Navy and other allied forces at that point. The USS *Niblack* prosecuted attacks when there was a submarine threat, the USS *Reuben James* was sunk, and the USS *Kearney* was damaged, during these operations.¹⁴⁷ Although no text of the UK-U.S. arrangement has been published, perhaps because it was an oral agreement or due to national security considerations, undoubtedly there was some sort of arrangement between the two countries.¹⁴⁸ States do not send their navies into harm's way without agreeing on terms. If Article 4(d) restated customary and general principles norms, it was proper for U.S. warships to not only respond to submarine attacks on them, but also to anticipate attacks with appropriate force measures.

Other Treaties Concluded before and during World War II. Defense treaties signed before and during World War II support a concept of anticipatory collective self-defense. Because the League of Nations and its treaty registration and publication system collapsed,¹⁴⁹ the record of international agreements during 1935–45 is not complete. What is available supports a view that States believed treaties could provide for anticipatory collective self-defense.

The USSR's pacts with France and Czechoslovakia (1935) pledged mutual assistance if either were subjected to "unprovoked aggression." The parties pledged consultation if threatened with aggression.¹⁵⁰ The 1936 treaty with

Mongolia followed the pattern.¹⁵¹ When war clouds loomed for the USSR in 1939, and the war had begun for other countries, Soviet treaties with Estonia and Latvia pledged that each would come to the other's assistance if there was "direct aggression or threat of aggression" (Estonia), or "direct attack or threat of attack" (Latvia).¹⁵²

British and French eleventh-hour bilateral mutual assistance treaties with Poland provided for reactive self-defense, but also pledged support and assistance if a European Power "clearly threatened," by "any action," "directly or indirectly," a party's independence, and that party "considered it vital to resist it with its armed forces."¹⁵³

After the war began for France and Britain, they pledged aid to Turkey if it were involved in hostilities with a European power, or if an act of aggression were committed against it. Turkey agreed to observe "at least a benevolent neutrality" if Britain or France were engaged in hostilities with a European power and would aid them if they became involved in hostilities because of guarantees given Greece or Romania. The parties also pledged mutual consultation.¹⁵⁴ The 20-year USSR-UK alliance (1942) pledged collective self-defense after the war if these States again became involved in hostilities with Germany or States associated with it.¹⁵⁵ France's alliance with the USSR had similar terms.¹⁵⁶ A USSR-UK alliance with Iran pledged defending Iran from "all aggression on the part of Germany,"¹⁵⁷ presumptively contemplating only reactive self-defense.

In the Western Hemisphere, the October 3, 1939, Declaration of Panama, negotiated while the American states were not at war, asserted:

As a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent . . . , whether such hostile act be attempted or made from land, sea or air.

The Declaration applied these standards to a 300-mile zone off the American coasts.¹⁵⁸ Although the zone may have been unlawful in terms of territorial scope,¹⁵⁹ because it was not proportional, the important point for this analysis is that the Declaration asserted a collective claim to freedom from effects of "attempted" hostile acts. To that extent, the Declaration implicitly declared a right of anticipatory collective self-defense. A 1941 Denmark-U.S. agreement for defending Greenland could also be said to be anticipatory in nature.¹⁶⁰ When it was signed, the United States was not at war, although

Germany had overrun Denmark. This treaty said there was a perceived threat to the Western Hemisphere as stated in the 1940 Act of Havana, the latter “considered, in effect, an act of self-defense by the American republics.”¹⁶¹ The Act created an emergency committee, empowered to act pending ratification of a convention, to assume governance of a belligerent’s Western Hemisphere colony or possession that was “attacked” or “threatened.” If “the need for emergency action [was] so urgent that action by the committee [could] not be awaited,” an American republic, unilaterally or jointly, “[had] the right to act in the manner which its own defense or that of the continent require[d].”¹⁶² This broad language left open a potential for anticipatory collective self-defense responses, particularly in view of authority given to make “urgent . . . responses to threat[s] . . .” The 1941 U.S. agreement to defend Iceland did not refer to the Act of Havana, but the president’s response in this executive agreement that Iceland’s defense was necessary to forestall a menace to Western Hemisphere security¹⁶³ might be construed as collective self-defense anticipatory in nature. U.S. defense of Iceland would forestall menaces to American republics subject to the Act of Havana.

The Potential for Anticipatory Collective Self-Defense. When the Covenant, the Locarno Treaty, and the Pact of Paris as interpreted by the Budapest Articles are considered together, there is strong argument for a view that they articulated the potential for anticipatory collective defense, perhaps not with precision. The Nyon Arrangement, and practice under it, was a clear example of anticipatory collective self-defense in action. The thrust of the Declaration of Panama and some international agreements before and during World War II were to the same effect. To be sure, the notion of self-preservation as equated with self-defense may have been discounted by then,¹⁶⁴ but an anticipatory collective self-defense claim remained admissible.

III. Drafting the Charter and Winding Up World War II

Research and drafting for a new international organization to replace the League of Nations began during World War II.¹⁶⁵ The UN Charter was signed during the last year of that war, with original Members’ ratifications often coming after hostilities ended. Agreements to prosecute war criminals, i.e., the Nuremberg Charter in 1945,¹⁶⁶ were also signed during the war, but judgments came down years later. The UN’s beginnings are, therefore, necessarily intertwined with the end of the war and the war crimes trials.

The drafting of the Charter as it related to collective self-defense is first analyzed. Trials of the major war criminals as those proceedings related to the issues of self-defense and anticipatory self-defense are then discussed.

The Charter Drafting Process and Collective Self-Defense. The draft emerging from discussions and preparations for the San Francisco Charter conference did not provide for self-defense, then considered inherent in nature.¹⁶⁷ The Act of Chapultepec, signed a month before the conference, included pledges of collective measures, including use of force, to meet threats or acts of aggression against a Western Hemisphere country.¹⁶⁸ Like the interwar agreements and practice,¹⁶⁹ the Act in effect declared a right to anticipatory collective self-defense.

Because of Latin American States' concerns, the San Francisco conference included Article 51 in the Charter.¹⁷⁰ Although some argue that the Charter confers a new right of collective self-defense in Article 51,¹⁷¹ States had been practicing collective self-defense, or had stated the right in so many words, in treaties long before the Charter was ratified.¹⁷² A related problem is whether there is a variant of self-defense apart from the standards of Article 51. Most say there is not.¹⁷³ However, the *Nicaragua Case*, holding a parallel customary norm bound the litigants when the Charter could not be applied,¹⁷⁴ may open a door to developing principles opposing Charter norms¹⁷⁵ and possibly outweighing Charter principles.¹⁷⁶

Exercising a right of collective self-defense need not be pursuant to a multilateral arrangement; a country may assist another under a bilateral treaty or without any previous treaty or other arrangement:

[T]he *travaux préparatoires* . . . [for the Charter support this view. While it is true that it was for purposes of fitting regional arrangements, and particularly the inter-American System, into the general international organization that Article 51 was added at San Francisco. However, the discussions at San Francisco not only by members of regional arrangements in the proper sense of that term, but also by parties to bilateral treaties governing their joint security, as well as assistance by one State to another without any treaty obligation. Article 51 was deliberately transferred . . . from Chapter VIII to Chapter VII with the result that the right of collective self-defense had become "entirely independent of the existence of a regional arrangement."¹⁷⁷

Collective self-defense does not depend on "the degree of organization or of treaty relationship" of states.¹⁷⁸ "Collective" covers more than contractual systems of self-defense.¹⁷⁹ "Any Member . . . is therefore authorized by the

Charter to assist with its armed force an attacked State, whether or not there has been any previous arrangement to that effect.”¹⁸⁰

Although it has been argued that an assisting State must have substantive rights or interests affected by an attacking State’s action,¹⁸¹ or that an assisting State must have an individual right of self-defense,¹⁸² neither is a prerequisite for coming to the aid of a target State. Any assisting State acts out of general interest in international peace and security, and can do so without a formal treaty as long as the target State consents.¹⁸³ A State assisting a target State need not be subjected to armed attack, i.e., to invoke the right of self-defense for itself.¹⁸⁴ However, “collective self-defense has in any event always to be based ultimately upon the right of an individual State to take action in self-defense. . . . If . . . not linked by a previous arrangement with the attacked State [e.g., a bilateral or multilateral treaty, assisting states] have the right to use force to provide assistance on the basis of an explicit request by the [target] state.”¹⁸⁵ The political truth in today’s information age may point to use of treaties instead of informal collective self-defense arrangements. Nevertheless, such informal arrangements are lawful in the Charter era.

The foregoing analysis has not responded to the problem of States with divergences of views on the scope of self-defense, i.e., where some State’s policy espouses anticipatory self-defense and the other State(s) has or have a more restrictive, reactive (“take the first hit”) policy,¹⁸⁶ or where States may share the same general policy, e.g., that of anticipatory self-defense, but differ as to situations and circumstances when the norm applies.¹⁸⁷

Where an assisting State with an anticipatory self-defense policy comes to the aid of a State with a restrictive view, it will be presumed in the case of prior treaty or other arrangements or a request in the absence of these that the restrictive view State negotiated the treaty or other arrangement, or made the request, with knowledge of the assisting State’s policy, and that the assisting State is free, but is not obliged, to employ anticipatory self-defense to fulfill its treaty or arrangement obligations. In the reverse situation, where a restrictive view State assists a State with a policy of anticipatory self-defense, the same principles should obtain. The assisting State may, but is not obliged, to invoke anticipatory self-defense; the anticipatory self-defense State knew or should have known of the self-imposed limitations on the assisting State. In either case, there is no need, as a matter of law, for the target State to request a kind or degree of assistance from the assisting State. However, as a matter of policy, the target State may request, and the assisting State should consider, a certain kind or degree of assistance for the target State. Thus, a target State might ask for self-defense help that amounts to reactive and not anticipatory action; in that

case, the assisting State must consider whether it can, as a matter of policy, stop at that line, commensurate with the perceived need to assure safety of its contributed forces or perhaps its municipal governance limitations, e.g., action taken by its parliament. In the reverse situation, where an anticipatory self-defense country asks for what amounts to anticipatory self-defense help from a State espousing a restrictive view, the same principles should apply.

There is a critical difference between a treaty relationship and a more informal request or arrangement when a situation develops. Failure to comply with a treaty term as perhaps understood by prior interpretive practice carries with it risk of denunciation¹⁸⁸ or claims of breach,¹⁸⁹ fundamental change of circumstances,¹⁹⁰ impossibility of performance,¹⁹¹ etc.

The foregoing assumes a bilateral relationship, by treaty or otherwise. The problem is more complicated in circumstances of multilateral relationships.

If a State or States with the same anticipatory self-defense view aid a group of States, all of whom have the same reactive view, or if a reactive view State or States aid a group of States, all of whom espouse anticipatory self-defense, the result is the same as in the bilateral context.

Suppose, however, some assisting States have anticipatory self-defense positions and others have a reactive self-defense policy, and target States have similarly differing views. Second, suppose some assisting States have differing anticipatory defense views,¹⁹² and others have differing reactive self-defense policies, and the same is true for target States. The same, and perhaps greater, risks of denunciations or claims of treaty breach, fundamental change of circumstances or impossibility, might be lodged.¹⁹³ One solution to this problem might be the Vienna Convention on the Law of Treaties approach on reservations,¹⁹⁴ i.e., that anticipatory self-defense applies only as to those states that mutually agree on principles and that otherwise the lowest common denominator, perhaps a diminished scope for anticipatory self-defense or only reactive self-defense, applies as between parties.¹⁹⁵ In a multinational military operation, this could create the kind of legal nightmare that Vienna Convention analysis promises for multilateral treaties.¹⁹⁶ Alternatives might be an analogy to the traditional rule for treaty reservations, i.e., all States must concur¹⁹⁷ or assistance will end. Another alternative is consultation in a given situation, with a treaty term to that effect if a multilateral agreement is negotiated, instead of relying on arrangements or target State request(s). That appears to be the direction of mutual defense treaties.¹⁹⁸

There are two more issues involved with claims of self-defense. First, States may change policies after ratifying a treaty, perhaps moving from reactive self-defense to an anticipatory self-defense posture. A State may declare a shift

within policy, e.g., what was not considered a proper circumstance for claiming anticipatory self-defense yesterday is today within the scope of a proper claim. Might such a shift in policy at the least cause discomfort among treaty partners, and at worst trigger denunciations or claims of treaty breach, fundamental change of circumstances, or impossibility of performance?¹⁹⁹

The second involves the attacking State's posture. If an attacking State, a target State and an assisting State share common self-defense positions, this would tend to legitimize assisting State operations as a manifestation of local, or special, custom.²⁰⁰ If the assisting and target States take one view of the issue, and the attacking State has another, this might be grounds for a claim that an opponent has not engaged in legitimate action. Thus, if an assisting State would wish to assert that it is acting within the law, it could more safely do so if it acts according to its allies' or opponents' views. Where a State has an anticipatory self-defense view, this might mean employing military force in only a reactive self-defense mode, or at least claiming to do so, if the opponent or target State has adopted the restrictive view. This is a policy decision and not a question of law; it is akin to rules of engagement (ROE) more restrictive than actions the law permits. ROE for combat forces may provide for wartime and peacetime scenarios, in which rights to individual or collective self-defense, including anticipatory self-defense, may be more circumscribed than the law would allow.²⁰¹

Many of these issues do not find responses in reported practice or decisional law.

The War Crimes Trials and Self-Defense. The Nuremberg International Military Tribunal relied on the Pact of Paris in its findings of guilt.²⁰² The Tribunal rejected defense claims that Germany had acted in self-defense.²⁰³ Admiral Erich Raeder's theory was that Germany occupied Norway as a necessary act of self-defense to forestall Allied landings there. Citing the *Caroline Case*,²⁰⁴ the Tribunal recognized a right of anticipatory self-defense: "[P]reventative action in foreign territory is justified only in the case of an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment for deliberation." This was not true for German invasions of Denmark and Norway, the Tribunal ruled.²⁰⁵ The defense was unable to demonstrate "an intention formed in good faith and honesty of conviction to protect one's safety, that safety being immediately threatened."²⁰⁶

In the Tokyo trials involving Japanese accuseds, a defense was that because the Netherlands had declared war on Japan before Japan had made a formal

war declaration,²⁰⁷ attacks against Dutch Asian territories were in self-defense. The Tribunal held the Netherlands had acted in anticipatory self-defense:

The fact that the Netherlands, . . . fully apprised of the imminence of the attack [by Japan], in self-defense declared war against Japan on 8th December and thus officially recognised the existence of a state of war which had been begun by Japan, cannot change that war from a war of aggression [by] . . . Japan into something other than that.

There was strong evidence of Japan's preparations to invade the Dutch East Indies, and the Netherlands chose to declare war before Japan's formal declaration. The Netherlands did not then have self-defense treaties with the Allies, insofar as the published record shows. However, her acting in concert with the Allies immediately afterward is some evidence of informal collective self-defense, a concept recognized before and after ratification of the Charter.²⁰⁸

These decisions, coming just after the General Assembly had confirmed the Nuremberg Charter as customary law,²⁰⁹ strongly evidence²¹⁰ a right of anticipatory self-defense and perhaps, for the Netherlands, the practice of informal collective self-defense arrangements.

Anticipatory Collective Self-Defense at the Creation of the UN System. The record during and just after World War II does not show that the law of collective self-defense, including anticipatory collective self-defense, was anything other than what had gone before. The Charter drafters included a right of collective self-defense, largely at the behest of parties to the Act of Chapultepec, but they did so in the context of the Pact of Paris, the Locarno Treaties, and other agreements, e.g., Nyon²¹¹ and bilateral treaties in 1935 and thereafter.²¹² Invoking collective self-defense under the Charter could come through formal treaty, informal arrangement, or by target State request.²¹³ Problems of varying views on the scope of self-defense within these modalities were not resolved when this norm was written into the Charter.²¹⁴ The Nuremberg and Tokyo judgments were not handed down until after the Charter was in force, but they confirm a right of anticipatory self-defense.²¹⁵

IV. Collective Self-Defense Treaties during the Charter Era

Bilateral and multilateral defense agreements have been concerned with collective self-defense since 1945.²¹⁶ Article 51 states a right and not a duty of self-defense; however, the right is transformed into a duty in self-defense

treaties.²¹⁷ Part IV.A discusses these arrangements, and Part IV. B argues that national decision makers should be bound by what they knew or should have known at the time the decision to respond in anticipatory self-defense was made, the standard used in the law of armed conflict, i.e., the *jus in bello*.

Treaties Providing for Collective Self-Defense. The Act of Chapultepec, instrumental in shaping Article 51 of the Charter,²¹⁸ was replaced by the Rio Treaty (1947), Article 3(1) of which provides that armed attack on an American State is considered an attack on all American states and that each party undertakes to assist in meeting the attack “in the exercise of the inherent right of individual or collective self-defense recognized by Article 51. . . .” Article 3(1) is nearly identical with Part I(3) of the Act.²¹⁹ Undoubtedly, the Treaty drafters wished to carry forward the meaning of the inherent right of self-defense incorporated in the Act in 1945, which had been adopted in Article 51.²²⁰

The Treaty also declares that “[o]n the request of the State or States directly attacked” and until there is a decision by the Inter-American System’s Organ of Consultation, each party may determine “immediate measures” it may take to fulfill the collective self-defense obligation.²²¹ These self-defense measures can proceed until the UN Security Council takes measures necessary to maintain international peace and security.²²² If any American State’s inviolability, territorial integrity, sovereignty, or political independence is affected by aggression that is not an armed attack, by a conflict, “or by any other fact or situation that might endanger the peace of America,” the Treaty’s Organ of Consultation must meet immediately to agree on measures to be taken, in case of aggression, to assist a victim of aggression, or on measures that should be taken for common defense and the maintenance of peace and security.²²³

Article 4 of the 1948 treaty creating the Western European Union (WEU) provides similarly that if a party is “the object of an armed attack in Europe, the other . . . Parties will, in accordance with . . . Article 51 . . . , afford the party so attacked all the military and other aid and assistance in their power.”²²⁴ The Treaty provided for a Consultative Council “[f]or consulting together on all the questions dealt with in the . . . Treaty, which shall be organized as to be able to exercise its functions continuously.”²²⁵ (In 1955 the Council was renamed the Council of Western European Union, but otherwise its functions remain the same.)²²⁶ The 1948 agreement also provides for reporting to the Security Council and ending WEU action when the Council takes measures necessary to maintain or restore international peace and security. Nothing in the Treaty

“prejudice[s] in any way the obligations of the . . . Parties under the . . . Charter. . . .”²²⁷ There is nothing in the Treaty to indicate that its drafters did not consider that they were carrying forward the understanding of the Charter drafters, i.e., that WEU States can invoke the inherent right of self-defense; the Treaty’s explicit reference to Article 51 tends to confirm this. The 1954 WEU Protocols provide for forces to be contributed for self-defense.²²⁸ Protocol I declares that parties “shall work in close co-operation” with NATO, and that the Council and its agency will rely on NATO military authorities for information and advice.²²⁹ The WEU, inactive for more than a decade, was revived in 1984 in connection with European Union integration;²³⁰ the 1980–88 Tanker War also spurred action.²³¹

In 1949 the North Atlantic Treaty was signed; Article 5 provides in part that

. . . [A]rmed attack against one or more of [the parties] in Europe or North America shall be considered an attack against them all; and consequently [the parties] agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.²³²

Specific reference to Article 51 carries forward an understanding that parties have inherent rights to individual and collective self-defense. Article 7 adds that the Treaty “does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are [UN] members . . . , or the primary responsibility of the Security Council for the maintenance of international peace and security.”²³³ States also agreed to “consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any . . . Part[y] is threatened.”²³⁴

In 1950 the Arab League signed a Joint Defense Treaty, whose Article 2 provides:

. . . Contracting States agree that an armed aggression, directed against any one or more of them or against their forces, shall be considered as directed against all. . . . [T]hey agree, in virtue of the right of legitimate self-defence, both individual and collective, to assist at once the State or States so attacked and to adopt immediately, both individually and collectively, all . . . measures and means at their disposal, including . . . employment of armed force, to repulse the aggression and restore peace and security.

The Security Council must be informed immediately of an aggression and steps and measures taken.²³⁵ Although it does not refer to Article 51 specifically, the Treaty could not contravene individual and collective self-defense rights proclaimed in the Charter.²³⁶ Article 3 also pledges:

. . . States shall consult together at the request of any one of them, whenever the integrity of the territory, independence or security of any one of them is exposed to danger.

In the event of the imminent risk of war or the advent of a sudden international development believed to be dangerous, . . . States shall at once hasten to coordinate their measures as the situation may require.²³⁷

The latter clause directly supports a view that the inherent right of collective self-defense includes a right of anticipatory self-defense. That the League contemplated more than reactive collective self-defense is also supported by the Treaty's Military Annex, Article 1(a); the Permanent Military Committee created by the Treaty is charged with "[p]repar[ing] . . . military plans to meet all foreseeable dangers or any armed aggression which might be attempted against one or more . . . Contracting States or their forces."²³⁸

In 1951 Australia, New Zealand and the United States concluded the ANZUS Pact. Similar to other mutual security agreements, and modeled on the North Atlantic Treaty,²³⁹ the Pact provides for consultation.²⁴⁰ There is "recogni[tion] that an armed attack in the Pacific Area on any . . . Part[y] would be dangerous to [other parties'] peace and safety." Parties will "meet the common danger in accordance with [their] constitutional processes." Like earlier agreements, there is a pledge of reporting to the Security Council and ending self-defense measures once the Council takes necessary measures.²⁴¹ Unlike the North Atlantic Treaty, however, there is no statement that attack on one is an attack on all.²⁴² However, the "armed attack" provision should receive the same construction as the phrase in the Charter, Article 51.²⁴³

The 1954 SEATO Treaty includes similar language on aggression by armed attack; consultation after a threat to a party's territory, sovereignty or political independence; and reporting to the Security Council. The Treaty requires a government's invitation or consent before action can be taken on that member's territory.²⁴⁴ The Pacific Charter (1954) declares parties' "determin[ation] to prevent or counter by appropriate means any attempt in the treaty area to subvert their freedom or to destroy their sovereignty or territorial integrity."²⁴⁵ Although SEATO Treaty obligations remain in effect, its supporting organization ceased to exist in 1975.²⁴⁶ France, the United

Kingdom and the United States are among the SEATO and Pacific Charter members.²⁴⁷

The Second Balkan Pact was signed in 1954, a partial successor to the 1933 Little Entente; its effective life was only a couple of years.²⁴⁸ Like its predecessor, Pact parties pledged consultation but “immediate . . .” collective defense against “armed aggression,” invoking Article 51 of the Charter. Thus, if Pact parties asserted individual claims to anticipatory self-defense, they would have incorporated those claims by joining the Pact.²⁴⁹

In 1955 some Arab League members signed the Baghdad Pact; Article 1 declared: “Consistent with Article 51 . . . Parties will co-operate for their security and defence,” perhaps through special agreements.²⁵⁰ Unlike the North Atlantic and other treaties, it did not provide for crisis consultation beyond agreement to determine measures to be taken once the Pact was in effect.²⁵¹ Members included Iran, Iraq (1955–59), Turkey, and the United Kingdom. A political failure, it dissolved in 1979.²⁵²

In 1955 the USSR and its European satellites signed the now-defunct²⁵³ Warsaw Pact. Its Article 4 paralleled the North Atlantic Treaty:

In the event of an armed attack in Europe on one or more of the . . . Parties . . . by any State or group of States, each . . . Party . . . shall, in the exercise of the right of individual or collective self-defence, in accordance with Article 51 . . . , afford the State or States so attacked immediate assistance, individually and in agreement with the other . . . Parties . . . , by all the means it considers necessary, including . . . armed force. . . . Parties . . . shall consult together immediately concerning the joint measures necessary to restore and maintain international peace and security.

Measures taken under this article shall be reported to the Security Council in accordance with the . . . Charter. These measures shall be discontinued as soon as the . . . Council takes the necessary action to restore and maintain international peace and security.²⁵⁴

Pact parties pledged to consult immediately to provide for joint defense and maintaining international peace and security, if a member “consider[ed] that a threat of armed attack on one or more of the . . . Parties to the Treaty ha[d] arisen. . . .” The North Atlantic Treaty, it will be recalled, provides for consultations if a party believes a member State’s territorial integrity, political independence, or security is threatened.²⁵⁵

Cold War era bilateral defense treaties also had similar language. Three binding the United States are typical. The Philippines Mutual Defense Treaty, Article 4, declares that “Each Party recognizes that an armed attack in the

Pacific Area on either . . . Part[y] would be dangerous to its own peace and security and declares that it would act to meet the common dangers in accordance with its constitutional processes.” In common with the multilateral treaties, the Philippines-U.S. agreement pledges reporting to the Security Council and ending defense measures when the Council takes measures necessary to restore and maintain international peace and security.²⁵⁶ Armed attacks are deemed to include attacks on metropolitan territories of either State, island territories under their jurisdiction, or their armed forces, public vessels, or aircraft in the Pacific.²⁵⁷ Like the multilaterals, the parties pledge to consult “whenever in the opinion of either of them the territorial integrity, political independence or security of either . . . is threatened by external armed attack in the Pacific.”²⁵⁸ The Republic of Korea Mutual Defense Treaty²⁵⁹ and the agreement with Japan²⁶⁰ have similar terms. The USSR concluded bilateral agreements with its European satellites to defend against “aggression,” sometimes naming Germany as the possible aggressor, or building on World War II arrangements; the Warsaw Pact was not intended to supersede these treaties.²⁶¹ Similarly, Britain and France ratified the Treaty of Dunkirk (1947) before WEU was formed; the Treaty states it was designed to prevent Germany from again becoming a “danger to the peace,” and like the abortive Versailles bilateral agreements promised mutual support if Germany committed aggression.²⁶² Depending on how aggression might be defined,²⁶³ the plain language of these agreements could support a view that they contemplated anticipatory and reactive self-defense, despite some States’ policy of reactive self-defense.

Each of these agreements requires consultation when there is a threat to a party’s territorial integrity, political independence, security, or the like. Except for the ANZUS Pact, they say that armed attack on one is an attack on all. Without exception, they refer to Charter requirements of reporting to the Security Council, etc.

Do these terms leave room for anticipatory collective self-defense as a response to a threat? Under a restrictive view of self-defense, i.e., that a target State must await the first blow,²⁶⁴ Article 51 allows response by State A after State B, with whom State A has a mutual self-defense treaty, has suffered an attack. Assuming there is a right of anticipatory self-defense,²⁶⁵ State B could respond before receiving the first blow, subject to necessity and proportionality principles.²⁶⁶ The remaining question is whether State A, which has not been a target of attack, could respond to an attack on State B and successfully claim collective anticipatory self-defense.

For reasons grounded in Charter law, the language of the collective self-defense treaties themselves, the history of collective self-defense agreement negotiations, and the practical realities of modern methods of warfare,²⁶⁷ there is a right to anticipatory collective self-defense in the Charter era. If there must be consultation before a self-defense response, as most agreements require,²⁶⁸ there is nothing in the agreements forbidding consultation before the first blow is struck. "The right of Members of the United Nations to prepare in advance for collective defence is implicit in their right to have recourse to collective defence."²⁶⁹ Since a right to collective self-defense is a customary norm, in terms of the treaties and practice before the Charter,²⁷⁰ it is implicit in that customary right as well. Consultation, or planning, can include measures to be taken in anticipatory collective self-defense. The Charter does not forbid planning for individual or collective self-defense, whether the response be reactive or anticipatory in nature.

Article 51 of the Charter, a treaty that has as its first and primary principle and purpose the maintenance of international peace and security,²⁷¹ lists alternatives of the inherent rights of individual or collective self-defense. The same conditions applying to individual self-defense, e.g., necessity and proportionality, apply to collective self-defense.²⁷² If this is so, a right of collective self-defense is coterminous with a right of individual self-defense, and if individual self-defense includes anticipatory self-defense as commentators and States argue,²⁷³ collective self-defense includes that option too.

Given the history of negotiations contemporaneous with the Charter (the Act of Chapultepec²⁷⁴) and running through the Rio Treaty (1947), the WEU Treaty (1948), the North Atlantic Treaty (1949), the Arab League Joint Defence Treaty (1950), and more recent agreements, there is evidence in the language of the agreements themselves to support a view that negotiators had anticipatory self-defense in mind, particularly with respect to consultations to deter aggression, including armed aggression.²⁷⁵ When the Charter's recognition of sovereignty is combined with the "inherent" right of self-defense and the supremacy of Charter law over inconsistent treaties,²⁷⁶ parties could not contract away an inherent right of self-defense, including collective self-defense, guaranteed by the Charter. And because the Charter negotiators operated against a background of prior treaty law, practice, judicial opinions, and commentators' views supporting a right of anticipatory self-defense,²⁷⁷ that right in the collective self-defense context carried forward into the Charter era.

The Temporal Problem: When Does Liability Accrue? Convictions at Nuremberg were based on what defendants knew, or should have known, when they decided to invade other States.²⁷⁸ Since then, there has been no authoritative statement on whether liability accrues based on what decision makers know, or should know, when a reactive or anticipatory self-defense response is contemplated. Commentators have been tempted to justify opinions, at least in part, on evidence available after a decision, perhaps years later.²⁷⁹

The developing law for *jus in bello* confirms that the proper standard for establishing liability is what decision makers know, or should have known, when an operation was authorized. Hindsight can be 20/20; decisions at the time may be clouded with the fog of war.²⁸⁰

Declarations of understanding²⁸¹ of four countries to 1977 Protocol I²⁸² to the Geneva Conventions of 1949²⁸³ state that for protection of civilians in Article 51,²⁸⁴ protection of civilian objects in Article 52,²⁸⁵ and precautions to be taken in attacks set forth in Article 57,²⁸⁶ a commander should be liable based on that commander's assessment of information available at the relevant time, i.e., when a decision is made.²⁸⁷ Two of the 1980 Conventional Weapons Convention's²⁸⁸ protocols have similar terms, i.e., a commander is only bound by information available when a decision to attack is made.²⁸⁹

Protocol I, with its understandings, and the Conventional Weapons Convention protocols are on their way to acceptance among States.²⁹⁰ These treaties' common statement, in text or declarations, that commanders will be held accountable based on information they have at the time for determining whether attacks are necessary and proportional has become a nearly universal norm. The *San Remo Manual* recognizes it as the standard for naval warfare.²⁹¹ It can be said with fair confidence that this is the customary standard for *jus in bello*. It should be the standard for *jus ad bellum*. A national leader directing a self-defense response, whether reactive or anticipatory, should be held to the same standard as a commander in the field deciding on attacks. A national leader should be held accountable for what he or she, or those reporting to the leader, knew or reasonably should have known, when a decision was made to respond in self-defense.

V. Conclusions and Projections for the Future

Since the Congress of Vienna attempted to impose order on post-Napoleonic Europe, countries great and small have tried to preserve peace and promote national security interests through collective security systems. Some arrangements have been general, e.g., the alliance system after

Waterloo. Others have been regional, e.g., treaties negotiated during the Crimean War. Many have been bilateral. Although many had terms stating a reactive self-defense theory, others provided for anticipatory self-defense. Practice of those times reveals use of informal arrangements as well.²⁹²

The new factor emerging after the Franco-Prussian War was defensive alliance systems, often in secret treaties, which could promote aggressive coalition warfare, but which provided for reactive and anticipatory collective self-defense. Arrayed against these alliances were bilateral and multilateral agreements that also bespoke reactive and anticipatory collective self-defense.²⁹³

The Treaty of Versailles and other agreements ending World War I established the League of Nations. The Covenant of the League, Part I of the postwar peace treaties, did not address self-defense directly, although the Covenant can be read as not excluding self-defense, including anticipatory self-defense. The Pact of Paris and its reservation through diplomatic notes, while outlawing aggressive war as national policy, preserved an inherent right of self-defense. Based on the treaty record before the Great War, this inherent right included anticipatory collective self-defense as an option for preserving international peace and security. The Nyon Arrangement, practice under it, other international agreements, the Budapest Articles, and international military tribunal decisions after World War II confirmed continuation of a right of anticipatory collective self-defense. There is also evidence that more informal arrangements could be concluded.²⁹⁴

Thus, when Charter Article 51 provided in 1945 for an inherent right of individual and collective self-defense in the context of the contemporary Act of Chapultepec, the right the Charter negotiators intended as inherent included a right of anticipatory collective self-defense.²⁹⁵ The record of multilateral treaties, bilateral agreements and State practice since 1945 confirms that right, which includes a right to conclude more informal arrangements. And while prior consultation may be a customary prerequisite to exercise of that right, consultation may include prior planning, including planning for anticipatory responses. There is nothing in the *Caroline Case* to forbid such.²⁹⁶ The inherent right to anticipatory collective self-defense, including a right to engage in more informal arrangements, continues today as it has existed since the Congress of Vienna. States can no longer adopt war as an instrument of national policy, but beyond that limitation, a right to self-defense, anticipatory or reactive, individual or collective, continues as before.²⁹⁷

Anticipatory collective self-defense, like unilateral anticipatory self-defense, is always tempered by necessity and proportionality principles. Nevertheless, the treaty record since 1815, although tortured, occasionally obscurely phrased, and sometimes muffled through secret treaties or reservations not part of published agreements, demonstrates that international law has recognized, and continues to recognize, a right of anticipatory collective self-defense. If confidence and participation in the UN system through affirmative Security Council action continues, it is likely that there will be more, not less, use of anticipatory responses,²⁹⁸ followed by Council decisions²⁹⁹ on further methods to contain threats to the peace, breaches of the peace, threats to States' territorial integrity, aggression, or invasion. One issue that should be resolved in the future is the temporal problem. States and their leadership should be held to what they knew, or should have known, when a decision for anticipatory collective response is taken.³⁰⁰

Some multilateral self-defense treaties negotiated since World War II have been abrogated (i.e., the Warsaw Pact³⁰¹) or have fallen into disuetude (e.g., SEATO³⁰²). Others, e.g., the Rio³⁰³ and North Atlantic³⁰⁴ treaties, remain in force. Bilateral agreements have come and gone.³⁰⁵ The surviving agreements' roles may be changing.³⁰⁶ New agreements, or perhaps informal arrangements,³⁰⁷ may be negotiated. What role anticipatory collective self-defense may play in these evolving developments is not clear. However, the terms of prior agreements, negotiated before and after 1945, and State practice, show that it would be appropriate, as a matter of international law, to include anticipatory self-defense as a response option until the Council acts pursuant to Article 51. How anticipatory collective self-defense as a peremptory norm (*jus cogens*) fits into this analysis, if at all, is also an inquiry for the future.³⁰⁸

Notes

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1. Compare, e.g., *Military & Paramilitary Activities in & Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 347 (Schwebel, J., dissenting) (Nicaragua Case); STANIMAR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 296 (1996); D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 187–93 (1958); BENGT BROMS, THE DEFINITION OF AGGRESSION IN THE UNITED NATIONS 127 (1968); ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW § 127 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); HANS Kelsen, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 27 (49 NAVAL WAR C. INT'L L. STUD., 1957); TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 122–44, 238–39, 253–84, 302 (1996); MYRES S. MCDUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232–41 (1961); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 152–55 (1991); JULIUS STONE, OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HUMAN HOPES 3 (1974); ANN VAN WYNEN THOMAS & A.J. THOMAS, THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 127 (1972); George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, 30 NAVAL WAR C. REV. 69–70 (May-June 1986); Christopher Greenwood, *Remarks, in Panel, Neutrality, The Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, 1988 PROC. AM. SOC'Y INT'L L. 158, 160–61 (1990); David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1991 DUKE J. COMP. & INT'L L. 57, 65–84, 122; A.V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, in THE LAW OF NAVAL OPERATIONS 109, 127–30 (64 Naval War C. Int'l L. Stud., Horace B. Robertson ed., 1991); James McHugh, *Forcible Self-Help in International Law*, 25 NAVAL WAR C. REV. 64 (Nov.-Dec. 1972); Rein Mullerson & David J. Scheffer, *Legal Regulation of the Use of Force*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA 93, 109–14 (Lori Fisler Damrosch et al. eds., 1995); John F. Murphy, *Commentary on Intervention to Combat Terrorism and Drug Trafficking*, LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 241 (Lori Fisher Damrosch & David J. Scheffer eds., 1991); W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in id. 25, 45; Horace B. Robertson, Jr., *Contemporary International Law: Relevant to Today's World?* 45 NAVAL WAR C. REV., 89, 101 (Summer 1992); Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World*, in LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT 43, 62–80 (67 Naval War C. Int'l L. Stud., Alberto R. Coll et al., eds. 1995); C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, 496–99 (1952) (anticipatory self-defense permissible, as long as principles of necessity and proportionality observed) with, e.g., IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 257–61, 275–78, 366–67 (1963); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 182–87, 190 (2d ed. 1994); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 121–22 (1995); PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166–67 (1948); D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 83, 171 (1979); 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 52aa, at 156 (Hersch Lauterpacht ed., 7th ed. 1952); AHMEN M. RIFAAT, INTERNATIONAL AGGRESSION 126 (1974); BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 675–76 (1994); Tom Farer, *Law and War*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 30, 36–37 (Cyril F. Black & Richard A. Falk eds., 1971); Yuri M. Kolosov, *Limiting the Use of Force: Self-Defense, Terrorism, and Drug Trafficking*, in LAW AND FORCE, *supra*, 232, 234; Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947); Rainer Lagoni, *Remarks, in*

Panel, *supra*, at 161, 162; Robert W. Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 29–30 (1951); *see also* Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586 (1951) (States may respond only after being attacked). The USSR generally subscribed to the restrictive view. Kolosov, *supra* at 234; Mullerson & Scheffer, *supra* at 107. U.S. policy is that States may respond in anticipatory self-defense, subject to necessity and proportionality principles. NAVAL WAR C. OCEANS LAW & POL'Y DEPT, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS: NWP 1–14 M/MCWP 5–2.1/COMDTPUB P5800.1 ¶¶ 4.3.2–4.3.2.1 (1997) (NWP 1–14). Nicaragua Case, *supra*, at 103, declined to address the issue. NWP 1–14, *supra*, replaces DEPT OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS: NWP 9A/FMFM 1–10 (1987) (NWP 9A).

2. ALEXANDROV, *supra* note 1, at 296; MCCORMACK, *supra* note 1, at 122–44, 238–39, 253–84, 302.

3. Compare ALEXANDROV, *supra* note 1, at 159–65 (1981 Israeli air raid on Iraqi nuclear reactor not anticipatory self-defense) with MCCORMACK, *supra* note 1, at 285–302 (raid within limits of anticipatory self-defense).

4. Compare, e.g., 1 D.P. O'CONNELL, INTERNATIONAL LAW 25 (1970) (favoring anticipatory self-defense) with O'CONNELL, *supra* note 1, at 83, 171 (then-current naval thinking was leaning toward the reactive view). 2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 795, 797, 803–08, 1044–45, 1095–1101 (I.A. Shearer ed., 1984) is equivocal on the point. Compare KELSEN, *supra* note 1, at 27 with KELSEN, THE LAW OF THE UNITED NATIONS 791–93 (1950) (same). Where possible, I have listed commentator's views based on their last published position.

5. Cf., e.g., Addendum to the Eighth Report on State Responsibility, 1980 2(1) Y.B. INT'L L. COMM'N 13, 66–70, U.N. Doc. A/CN.4/318/ADD.5–7; LELAND R. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 342–53 (3d ed. 1969); 2 O'CONNELL, *supra* note 4, at 795, 797, 803–08, 1044–45, 1095–1101. MCCORMACK, *supra* note 1, at 122, says that GOODRICH ET AL., *supra*, are among those favoring a restrictive or “reactive” view because of a statement in GOODRICH ET AL., *supra* at 353, but reading *id.* 342–53 for U.N. CHARTER, art. 51, seems to have these authors straddling the fence. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 3, Commentary 3.3 (Louise Doswald-Beck ed., 1995) (SAN REMO MANUAL) says the *Manual* takes no position on the issue.

6. Lowe, *supra* note 1, at 128.

7. *See generally* Leo Gross, *The Peace of Westphalia 1648–1948*, 42 AM. J. INT'L L. 20 (1948), commenting on Treaty of Peace, Oct. 14/24, 1648, Swed.-Holy Rom. Empire, 1 Consol. T.S. 198; Treaty of Peace, Oct. 14/24, 1648, Fr.-Holy Rom. Empire, *id.* 319.

8. Act of the Congress of Vienna, June 9, 1815, 64 Consol. T.S. 453. Treaty of Alliance, Mar. 15, 1815, *id.* 27, was a linchpin of the Congress system; it was succeeded by Treaty of Alliance and Friendship, Nov. 20, 1815, 65 *id.* 296. *See also infra* notes 14–22 and accompanying text; EUGENE V. ROSTOW, TOWARD MANAGED PEACE 42–43 (1993).

9. Parties to Treaty of Peace, *supra* note 7, art. 123, 1 Consol. T.S. at 354, were “obliged to defend and protect all and every Article of this Peace against any one,” can be said to be an early statement of the collective self-defense principle. *See also* Gross, *supra* note 7, at 24.

10. The Covenant of the League of Nations was in the Treaty of Versailles, June 28, 1919, Pt. I, 225 Consol. T.S. 189, 195–205, and other World War I peace treaties: Treaty of Nuilly-sur-Seine, Nov. 27, 1919, Pt. I, 226 *id.* 332, 335 (Bulgaria); Treaty of St. Germain-en-Laye, Sept. 10, 1919, Pt. I, *id.* 8, 13 (Austria); Treaty of Trianon, June 4, 1920, Pt. I, 113 Brit. For. & St. Pap. 486, 491–501 (Hungary). Although a signatory, the United States never

ratified these treaties, primarily because the U.S. Senate opposed the Covenant. See Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 75–76 (1991). The United States concluded bilateral peace treaties with Austria, Germany, and Hungary, incorporating parts of the multilateral peace treaties, e.g., Treaty of Versailles, *supra*. Treaty of Peace, Aug. 29, 1921, Hung.-U.S., art. 2, 42 Stat. 1951, 1953 (Treaty of Trianon); Treaty of Peace, Aug. 25, 1921, Ger.-U.S., art. 2, *id.* 1939, 1942 (Treaty of Versailles); Treaty of Peace, Aug. 24, 1921, Aus.-U.S., art. 2, *id.* 1946, 1948 (Treaty of St. Germain-en-Laye). Treaty of Sevres, Aug. 10, 1920, Pt. I, 113 Brit. & For. St. Pap. 652, 656, would have incorporated the Covenant for a peace treaty with Turkey; this agreement was never ratified. Treaty of Lausanne, July 24, 1923, 28 L.N.T.S. 11, ended the war for Turkey but did not refer to the Covenant. The United States never declared war against, and thus did not sign a peace treaty with, Turkey.

11. Treaty Providing for Renunciation of War as an Instrument of National Policy, Aug. 28, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (Pact of Paris).

12. Treaty of Alliance, Feb. 6, 1778, Fr.-U.S., arts. 1–4, 8 Stat. 6–8. Treaty of Amity and Commerce, Feb. 6, 1778, Fr.-U.S., arts. 6–7, *id.* 12, 16, and Treaty of Amity and Commerce, Oct. 8, 1782, Neth.-U.S., art. 5, *id.* 32, 34–36, pledged mutual maritime defense.

13. Declaration of Panama, Oct. 3, 1939, 3 Bevans 608. See also *infra* notes 158–63.

14. Treaty of Alliance, *supra* note 8; see also *supra* note 8 and accompanying text.

15. Act of the Congress of Vienna, *supra* note 8, which reorganized Europe. The coalition against Napoleon had pledged such a system in Treaty of Alliance, Mar. 14, 1814, 64 Consol. T.S. 27. See also ALAN PALMER, *THE CHANCELLERIES OF EUROPE* 6 (1983).

16. Holy Alliance, Sept. 11/26, 1815, art. 1, 65 Consol. T.S. 199, 201. *Id.*, art. 2, also proclaimed:

... In consequence, the sole principle of force, whether between the said Governments or between their Subjects, shall be that of doing each other reciprocal service, and of testifying by unalterable good will the mutual affection with which they ought to be animated, to consider themselves all as members of one and the same Christian nation; the three allied Princes looking on themselves as merely delegated by Providence to govern three branches of the One family, namely, Austria, Prussia, and Russia, thus confessing that the Christian world, of which they and their people form a part, has in reality no other Sovereign than Him to whom all the treasures of love, science, and infinite wisdom, that is to say, God, our Divine Saviour, the Word of the Most High, the Word of Life. Their Majesties consequently recommend to their people, with the most tender solicitude, as the sole means of enjoying that Peace which arises from a good conscience, and which alone is durable, to strengthen themselves every day more and more in the principles and exercise of the duties which the Divine Saviour has taught to mankind.

The preamble asserted that the signatories

... declare that the present [Alliance] has no other object than to publish, in the face of the whole world, their fixed resolution, both in the administration of their respective States, and in their political relations with every other Government, to take for their sole guide the precepts of that Holy Religion, namely, the precepts of Justice, Christian Charity, and Peace, which, far from being applicable only to private concerns, must have an immediate influence on the councils of Princes, and guide all their steps, as being the only means of consolidating human institutions and remedying their imperfections. . . .

Id., pmbi. See also PALMER, *supra* note 15, ch. 2.

17. See Letter of Emperor Francis of Austria, King Frederick William of Prussia, and Tsar Alexander of Russia to George, Prince Regent of Great Britain, Sept. 26, 1815; letter of Prince Regent to Francis, Frederick William, and Alexander, Oct. 6, 1815, *reprinted in* 1 MICHAEL HURST, *KEY TREATIES FOR THE GREAT POWERS 1814–1914*, at 97–99 (1972), which collects and translates most treaties referred to in this Part; many are published in the CONSOLIDATED TREATY SERIES. The Holy Alliance continued to function, to a certain extent, until the crisis leading to the Crimean War. See generally PALMER, *supra* note 15, at 23; A.J.P. TAYLOR, *THE STRUGGLE FOR MASTERY IN EUROPE: 1848–1918* chs. 2–3 (1954). The Alliance extended to the New World through family ties of the Austrian court to Brazil, a kingdom (1815) and an empire itself from 1822. The Alliance was a rationale for the Congress of Panama (1826) and the Monroe Doctrine. O. CARLOS STOETZER, *THE ORGANIZATION OF AMERICAN STATES* 7, 9, 14 (2d ed. 1993). COVENANT OF THE LEAGUE OF NATIONS, art. 21, declared that the Covenant would not “affect the validity of international engagements, such as . . . regional understandings like the Monroe Doctrine, for securing the maintenance of peace.” See also *infra* notes 36, 133–36, 158–63, 168–70, 218–23 and accompanying text.

18. Treaty of Alliance and Friendship, Nov. 20, 1815, pmbi., 65 Consol. T.S. 296, referring to Treaty of Alliance, Mar. 15, 1815, 64 *id.* 27. See also PALMER, *supra* note 15, at 6, 25–28.

19. Treaty of Alliance and Friendship, *supra* note 18, arts. 3–4, 6, 65 Consol. T.S. at 297–98.

20. Protocol of Conference, Nov. 15, 1818, 69 *id.* 365. The Concert of Europe “formed what was arguably the most successful European Settlement” and was a set of informal understandings in which European great powers acted to defuse problems that might lead to conflict among them. MICHAEL MANDELBAUM, *THE DAWN OF PEACE IN EUROPE* 106 (1996). See also DONALD KAGAN, *ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE* 83 (1995); Gross, *supra* note 7, at 20.

21. A decade later Russia and Turkey concluded Treaty of Defensive Alliance, July 8/26, 1833, arts. 1, 3–4, 84 Consol. T.S. 1, 3–5, providing that Russia would furnish forces to Turkey for defense against attack. Final Act of Ministerial Conferences to Complete and Consolidate Organization of the Germanic Confederation, May 15, 1820, arts. 35–41, 47, 71 *id.* 89, 116–18, contemplated collective action for threatened attacks as well as invasions. Treaty of Peace, Aug. 23, 1866, Aus.-Pruss., art. 4, 133 *id.* 71, 82 dissolved the Confederation.

22. PALMER, *supra* note 15, at 81–82. Fearful of an attempted Spanish reconquest of South America’s Andean states, Bolivia, Chile, New Granada (now Colombia), and Peru signed the Treaty of Lima, Feb. 8, 1848, which established a confederation of the signatories to meet the perceived threat. The danger dissipated; the treaty was never ratified. STOETZER, *supra* note 17, at 9.

23. See generally NWP 9A, *supra* note 1, ¶ 4.3.2.1, citing Bunn, *supra* note 1, at 70; R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 89 (1938); Letter of U.S. Secretary of State Daniel Webster to UK Ambassador Lord Alexander B. Ashburton, Aug. 6, 1842, *reprinted in* *Destruction of the Caroline*, 2 MOORE, *DIGEST* § 217, at 411–12; Letter of Secretary Webster to UK Minister Henry S. Fox, Apr. 24, 1841, in 1 KENNETH E. SHEWMAKER, *THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS* 58, 67 (1983). NWP 1–14, *supra* note 1, 4.3.2.1 n. 32 departs from this language, saying that “the Webster formulation is clearly too restrictive today, particularly given the nature and lethality of modern weapons systems which may be employed with little, if any, warning.”

24. For analysis of wartime diplomacy, see PALMER, *supra* note 15, at 101–10; TAYLOR, *supra* note 17, ch. 4.

25. Convention Relative to Military Aid to Be Given to Turkey, Apr. 10, 1854, Fr.-Gr. Brit., arts. 2, 4–5, 111 Consol. T.S. 393, 395–97.

26. Treaty of Offensive and Defensive Alliance, Apr. 20, 1854, Aus.-Pruss., *id.* 413, 424.

27. Later arrangements would determine forces' numbers, description, and destination. Prussia was invited to accede. Treaty of Alliance, Dec. 2, 1854, arts. 3, 6, 112 *id.* 295, 298.

28. Compare *id.* with Military Convention, Jan. 26, 1855, *id.* 453.

29. Common agreement would determine forces' numbers, description, and destination. Sweden pledged not to cede or exchange territory or give pasturage or fishery rights "or rights of any other nature whatsoever, . . . and to resist any pretension . . . by Russia . . . to establish the existence of any . . . Rights aforesaid." Treaty of Stockholm, Nov. 21, 1855, arts. 1–2, 114 *id.* 13, 15–16. The United States observed "benevolent neutrality," favoring Russia, during the war. JOHN LEWIS GADDIS, *THE LONG PEACE: INQUIRIES INTO THE HISTORY OF THE COLD WAR* 5 (1987).

30. General Treaty for Re-Establishment of Peace, Mar. 30, 1856, art. 8, 114 Consol. T.S. 409, 414, ending the Crimean War, provided for mediating future disputes before recourse to force and was a forerunner of U.N. CHARTER art. 33. Protocol of Conference, Apr. 14, 1856, 1 HURST, *supra* note 17, at 334, suggested the procedure be available for future disputes. In the Western Hemisphere, as a result of the William Walker filibustering expeditions, Chile, Ecuador, and Peru signed but did not ratify the Treaty of Mutual Assistance and Confederation, which provided that if the United States attacked one or more parties, all would unite against the aggressor. The treaty was never ratified. STOETZER, *supra* note 17, at 9–10.

31. Count Nigra, Notes on Results of Meeting between Napoleon III of France and Count Cavour of Piedmont, July 20, 1858, arts. 1, 3–4, 1 HURST, *supra* note 17, at 401.

32. Treaty Relative to Independence and Neutrality of Belgium, Aug. 9, 1870, Gr. Brit.-Pruss., arts. 1–2, 141 Consol. T.S. 435, 438–39; Treaty Relative to Independence and Neutrality of Belgium, Aug. 11, 1870, Fr.-Gr. Brit., arts. 1–2, *id.* 441, 443–44. Treaty Relative to Separation of Belgium from Holland, Nov. 15, 1831, art. 7, 82 *id.* 255, 259; Treaty of London, Apr. 19, 1839, art. 7, 88 *id.* 445, 449, also had guaranteed Belgian neutrality. German violation of Belgian neutrality was a cause of World War I. KAGAN, *supra* note 20, at 61, 129, 204.

33. PALMER, *supra* note 15, at 118.

34. The Russian fleets were then wintering in New York and San Francisco. JAMES P. DUFFY, *LINCOLN'S ADMIRAL: THE CIVIL WAR CAMPAIGNS OF DAVID FARRAGUT* 220–21 (1997). The Russian visit came at a low point in Union fortunes; the Russians were feted in New York, San Francisco, and Washington. Whether Russia and the United States discussed an alliance then or in 1861 has been debated; most assert that there were at least conversations toward that end. See D.P. CROOK, *THE NORTH, THE SOUTH, AND THE POWERS 1861–1865*, at 317–18 (1974); DONALDSON JORDAN & EDWIN J. PRATT, *EUROPE AND THE AMERICAN CIVIL WAR* 200–01 (1969); ALBERT A. WOLDMAN, *LINCOLN AND THE RUSSIANS* ch. 9 (1952). GADDIS, *supra* note 29, at 5–6, linked this proposed cooperation to U.S. "benevolent neutrality" during the Crimean War.

35. See *supra* note 17, *infra* notes 177–85 and accompanying text.

36. Treaty of Alliance Against Paraguay, May 1, 1865, art. 1, 131 Consol. T.S. 119, 120; Treaty of Union and Defensive Alliance, Jan. 23, 1865, art. 1, 130 *id.* 401, 402; Treaty of Alliance, July 10, 1865, 131 *id.* 305, 306; see also STOETZER, *supra* note 17, at 10, 266. A war with some of these States sputtered on until the United States mediated an armistice. See Armistice, Apr. 11, 1871, 143 Consol. T.S. 129, 132.

37. Definitive Treaty of Peace, May 10, 1871, Fr.-Ger., 143 Consol. T.S. 163.

38. ROBERT H. FERRELL, *PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND PACT* 6 (1968), referring to Hague Convention (III) Relative to Opening of Hostilities, Oct. 18, 1907, arts. 1, 3, 36 Stat. 2259, 2271 (Hague III).

39. Hague Convention (II) Respecting Limitation of Employment of Force for Recovery of Contract Debts, Oct. 18, 1907, art. 1, *id.* 2241, 2251 (Hague II).

40. TAYLOR, *supra* note 17, at 255.

41. GADDIS, *supra* note 29, at 222, notes that the simpler alliance systems of the Cold War, coinciding with much of the Charter era, are more durable than those of the past century, which depended on skill of a Metternich or Bismarck to hold them together.

42. For analysis of alliance systems since World War II in the context of collective self-defense, see *infra* notes 216–78 and accompanying text. George K. Walker, *Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent*, 6 TRANSNAT'L LAW. 1, 12–24 (1993) surveys development of European economic systems, particularly the European Union.

43. Agreement, May 25/June 6, 1873, Aust.-Hung.-Russ., arts. 2–3, 146 Consol. T.S. 217, 220–21, to which Germany acceded Oct. 22, 1873. See 2 HURST, *supra* note 17, at 508; PALMER, *supra* note 15, at 151.

44. Convention of Defensive Alliance, June 4, 1878, Gr. Brit.-Turk., art. 1, 153 Consol. T.S. 67, 69.

45. Treaty of Alliance, Oct. 7, 1879, Aust.-Hung.-Ger., arts. 1–2, 155 *id.* 303, 307, extended for five years by Protocol in Regard to Prolongation of Alliance of 1879, Mar. 22, 1883, 2 HURST, *supra* note 17, at 629. Protocol Concerning Continuation of Treaty of 1879 and Protocol of 1883, June 1, 1902, Aust.-Hung.-Ger., *id.* at 732, extended the arrangement indefinitely on a three-year renewal basis.

46. TAYLOR, *supra* note 17, at 264; see also WILLIAM L. LANGER, *EUROPEAN ALLIANCES AND ALIGNMENTS* 171–96 (1931); PALMER, *supra* note 15, at 163–66, reporting talks between French and Russian staffs through the next decade.

47. This provision applied if a party were at war with Turkey, but only after previous agreement among the three States. League of the Three Emperors, June 18, 1881, art. 1, 158 Consol. T.S. 461. Treaty Concerning Prolongation of Treaty of 1881, Apr. 15, 1884, 2 HURST, *supra* note 17 at 634, extended and slightly modified the 1881 agreement. In Treaty of Alliance, June 16/28, 1881, Aus.-Hung.-Serbia, 159 Consol. T.S. 1, the parties pledged benevolent neutrality if either was at war; Treaty Prolonging the Treaty of 1881, Jan. 28/Feb. 9, 1889, Aus.-Hung.-Serbia, 171 *id.* 485, extended it to 1895. Declaration Affirming Engagement of Mutual Neutrality, Oct. 2/15, 1904, Aust.-Hung.-Russ., 196 *id.* 392, 394 pledged reciprocal “loyal neutrality” if either was involved in war with a third State; the treaty did not apply to the Balkans. For analysis of the League, see LANGER, *supra* note 46, at 196–212; TAYLOR, *supra* note 17, at 279–72, 304, who says the League was a “fair-weather system” that “worked only so long as there was no conflict.”

48. Treaty of Defensive Alliance, Feb. 6, 1873, Bol.-Peru, art. 1, 145 Consol. T.S. 475, 484, and Protocol, May 5, 1879, *id.* 482; see also Treaty of Peace and Amity, Oct. 20, 1883, Chile-Peru, 162 *id.* 453; Armistice Convention, Apr. 4, 1884, Bol.-Chile, 163 *id.* 423; STOETZER, *supra* note 17, at 10, 266.

49. LANGER, *supra* note 46, at 246.

50. Treaty of Alliance, May 20, 1882, arts. 2–3, 160 Consol. T.S. 237, 241.

51. *Id.*, arts. 4–6, renewed by Second Treaty of Triple Alliance, Feb. 20, 1887, art. 1, 169 *id.* 139, 141. Separate Treaty, Feb. 20, 1887, Aus.-Hung.-Italy, *id.* 143; Separate Treaty, Feb. 20, 1887, Ger.-Italy, *id.* 147, required Germany to go to war if Italy went to war to protect its African

interests. Germany and Russia signed the Reinsurance Treaty, June 18, 1887, arts. 1–2, 169 *id.* 317, pledging that if either went to war with a third Great Power, the other would observe benevolent neutrality, and recognized Russia's interest in the Balkan peninsula and that the Straits of the Bosphorus and Dardanelles should always remain open. An Additional Protocol, June 18, 1887, *id.* 323–24, provided that Germany would help Russia establish a regular government in Bulgaria, and that Germany would be a benevolent neutral if Russia had to defend the entrance to the Black Sea. The Reinsurance Treaty was allowed to lapse in 1890. PALMER, *supra* note 15, at 179. A third Triple Alliance was negotiated in Treaty of Alliance, May 6, 1891, 175 Consol. T.S. 105. Fourth Treaty of Triple Alliance, June 28, 1902, art. 14, 191 *id.* 286, 295, renewed the alliance for six years, with a possibility of a further six-year renewal. Agreement Explaining and Supplementing Article VII of Treaty of Triple Alliance of 1887, Dec. 15, 1909, Aust.-Hung.-Italy, 2 HURST, *supra* note 17, at 812, dealt with Balkan issues. Fifth Treaty of Triple Alliance, Dec. 5, 1912, 217 Consol. T.S. 311, renewed the alliance for the last time. The 1882 treaty's operative terms, arts. 1–5, remained the same throughout.

52. E.g., Secret Protocol, Nov. 15, 1818, 69 Consol. T.S. 369, among the victors of the Napoleonic wars, had a Military Protocol, *id.* 374, and was signed the same day as the published treaty; Protocol of Conference, *supra* note 30, admitted France to the Concert of Europe. See also *supra* notes 14–22 and accompanying text. COVENANT OF THE LEAGUE OF NATIONS art. 18 required that League Members' future treaties be registered with the League Secretariat and be published by it. No treaty would be binding until registered. This superseded terms like Treaty of Alliance, May 20, 1882, art. 6, 160 Consol. T.S. at 241, and State practice. "Open covenants of peace openly arrived at" had been the first of President Woodrow Wilson's Fourteen Points. Covenant Members soon ignored art. 18. FERRELL, *supra* note 38, at 54–61. U.N. CHARTER art. 102 admonishes Members to submit their treaties for registration; a consequence for nonfiling is that a treaty cannot be invoked before a UN organ. See also GOODRICH ET AL., *supra* note 5, at 610–14; SIMMA, *supra* note 1, at 1103–16. Security agreements are often not published. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 r.n.5 (1987) (RESTATEMENT (THIRD)).

53. TAYLOR, *supra* note 17, at 264.

54. Romania had to aid Austria-Hungary only if she were attacked in territory of States bordering Romania. Treaty of Alliance, Oct. 30, 1883, Aus.-Hung.-Rom., arts. 2–3, 162 Consol. T.S. 488, 491.

55. Germany accepted the treaty verbatim; Italy required consultation before action. Treaty Providing for Accession of Germany, Oct. 30, 1883, 162 *id.* 487, 493; Treaty Providing for Accession of Italy, May 15, 1888, 171 *id.* 61. Treaty of Alliance, July 13/25, 1892, Aus.-Hung.-Rom., 177 *id.* 273, renewed the relationship; Germany and Italy acceded. Treaty Providing for Accession of Germany to the Alliance, Nov. 11/12, 1892, 178 *id.* 17; Treaty Providing for Accession of Italy to the Alliance, Nov. 28, 1892, *id.* 39. Protocol, Sept. 30, 1896, 183 *id.* 379, extended the alliance to 1902. Germany and Italy acceded. Accession of Germany, May 7, 1899, *id.* 383; Accession of Italy, June 5, 1899, *id.* 389. The relationship was extended by Third Treaty Renewing Alliances of 1892 and 1896, Apr. 4/17, 1902, Aust.-Hung.-Rom., 191 *id.* 117; Treaty Providing for Accession of Germany to the Alliance, July 12/25, 1902, 2 HURST, *supra* note 17, at 729; Treaty Providing for Accession of Italy to the Alliance, Dec. 12, 1902, Aust.-Hung.-Italy, *id.* 730; and by Treaty Renewing the Alliances of 1892, 1896, and 1903, Feb. 5, 1913, 217 Consol. T.S. 384; Treaty Providing for Accession of Germany to the Alliance, Feb. 13/26, *id.* 390; Treaty Providing for Accession of Italy, Mar. 5, 1913, Aust.-Hung.-Italy, *id.* 393.

56. Treaty of Alliance, *supra* note 51; see also *supra* notes 49–53 and accompanying text.

57. Note of Russian Ambassador to France M. de Mohrenheim to French Foreign Minister M. Ribot, Aug. 15/27, 1891, annexing Letter of Russian Foreign Affairs Minister Nikolai Giers to de Mohrenheim, Aug. 9/21, 1891; Note of Ribot to de Mohrenheim, Aug. 27, 1891, 2 HURST, *supra* note 17, at 662–65.

58. Draft of Military Convention, 1892, Fr.-Russ., *id.* 668, approved by Note of Giers to French Ambassador to Russia M. de Montbello, Dec. 15/27, 1893, *id.* 669. For diplomatic history analysis, see 1 WILLIAM L. LANGER, *THE DIPLOMACY OF IMPERIALISM 1890–1912* chs. 1–2 (1935); TAYLOR, *supra* note 17, ch. 15.

59. PALMER, *supra* note 15, at 180.

60. *Id.* 203; TAYLOR, *supra* note 17, ch. 18, analyzing Declaration Respecting Egypt and Morocco, Apr. 8, 1904, Fr.-Gr. Brit., 195 Consol. T.S. 198; Convention Respecting Newfoundland and West and Central Africa, Apr. 8, 1904, Fr.-Gr. Brit., *id.* 205. See also KAGAN, *supra* note 20, at 177–78.

61. PALMER, *supra* note 15, at 211; TAYLOR, *supra* note 17, at 427–46, analyzing Convention Relating to Persia, Afghanistan, and Tibet, Aug. 31, 1907, Gr. Brit.-Russ., 204 Consol. T.S. 404.

62. TAYLOR, *supra* note 17, at 511. Only after the Great War began did Britain, France, and Russia sign the Pact of London, Sept. 5, 1914, 220 Consol. T.S. 330, pledging to continue the conflict until a satisfactory peace could be obtained. PALMER, *supra* note 15, at 232.

63. KAGAN, *supra* note 20, at 150–51; PALMER, *supra* note 15, at 209. DON COOK, *FORGING THE ALLIANCE* 33 (1989) claims Britain's first peacetime defensive alliance was Treaty of Dunkirk, Mar. 4, 1947, Fr.-U.K., 9 U.N.T.S. 187. However, the United Kingdom in effect allied with other States in Treaty of Alliance and Friendship, *supra* note 18, to enforce the Congress of Vienna system, the Nyon Arrangement, Sept. 14, 1937, 181 L.N.T.S. 135, and Arrangement Supplementary to the Nyon Arrangement, Sept. 17, 1937, *id.* 149, and with Poland just before World War II. See *supra* notes 14–22; *infra* notes 138–43, 153, 224–31, 262 and accompanying text. While Cook's statement is technically correct, the effect of these treaties was a defense alliance in each case.

64. Treaty of Alliance, Mar. 30, 1904, Bulg.-Serb., arts. 2–4, 2 HURST, *supra* note 17, at 752.

65. Treaty of Amity and Alliance, Feb. 29/Mar. 13, 1912, Bulg.-Serb., 215 Consol. T.S. 390; Military Convention, Bulg.-Serb., Apr. 29/May 11, 1912, 2 HURST, *supra* note 17, at 822. An Alliance, Sept. 12/Oct. 6, 1912, Monteneg.-Serb., *id.* 828, included a decision in the Political Convention, art. 4, *id.* at 829, to go to war with Turkey. Military Convention, arts. 1–2, *id.*, provided for strategic defense in war with Austria-Hungary and strategic offense in war with Turkey.

66. Treaty of Defensive Alliance, May 16/29, 1912, Bulg.-Gr., art. 1, 216 Consol. T.S. 179. See also Military Convention, Sept. 12, 1912, Bulg.-Gr., 2 HURST, *supra* note 17, at 830.

67. Treaty of Alliance, May 19/June 1, 1913, Gr.-Serb., art. 1, 218 Consol. T.S. 166, 167; Military Convention, May 19/June 1, 1913, *id.* 170; see also Protocol Concerning Conclusion of Treaty of Alliance, Apr. 22/May 5, 1913, *id.* 117. The Second Balkan War ended with Treaty of Peace, May 30, 1913, *id.* 159; Treaty of Peace, July 28/Aug. 10, 1913, *id.* 322.

68. See *supra* notes 60–63 and accompanying text.

69. Agreement Respecting Rights in Eastern Asia and India, Gr. Brit.-Japan, July 13, 1911, arts. 1–3, 5, 214 Consol. T.S. 107–08; see also 2 LANGER, *DIPLOMACY*, *supra* note 58, ch. 23.

70. KAGAN, *supra* note 20, at 128–29; but see TAYLOR, *supra* note 17, at 527–28.

71. Hague III, *supra* note 38, arts. 1, 3, 36 Stat. at 2251; see also *supra* note 38 and accompanying text.

72. See generally PALMER, *supra* note 15, at 226–30; TAYLOR, *supra* note 17, at 520–30; BARBARA TUCHMAN, *THE GUNS OF AUGUST* 91–157 (1962).
73. TAYLOR, *supra* note 17, at 527–28.
74. Pact of Paris, *supra* note 11, arts. 1–2. *see also infra* notes 111–27 and accompanying text.
75. See *supra* notes 51–53 and accompanying text.
76. Hague II, *supra* note 39, art. 1, 36 Stat. at 2251; Hague III, *supra* note 38, arts. 1, 3, *id.* at 2271.
77. See *supra* notes 19, 21, 25, 32, 36, 43, 51, 54–55, 57, 69 and accompanying text.
78. See *supra* notes 21–22, 24–33, 36, 46, 57–61, 64, 69 and accompanying text.
79. See *supra* notes 24–30 and accompanying text.
80. See *supra* note 29 and accompanying text.
81. See *infra* notes 165–277 for analysis of self-defense in the Charter era.
82. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, modified by Protocol on Accession of Greece and Turkey, Oct. 17, 1951, 3 U.S.T. 43, 126 U.N.T.S. 350; Protocol on Accession of Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 5707, 243 U.N.T.S. 308; Protocol on Accession of Spain, Dec. 10, 1981, 34 U.S.T. 3510, analyzed *infra* notes 229, 232–34 and accompanying text. In 1997, agreements were signed to admit Czech Republic, Hungary and Poland to North Atlantic Treaty membership, with perhaps Romania and Slovenia to follow in a second round. The protocol is before the U.S. Senate for advice and consent. Predictably, the Department of State has promoted the expansion; others are critical of it. See generally U.S. Secretary of State Madeleine K. Albright, *NATO Expansion: Beginning the Process of Advice and Consent: Statement Before the Senate Foreign Relations Committee*, 8 U.S. Dep’t St. Dispatch 1 (Oct. 1997) (favoring expansion); Albright, *NATO Expansion: A Shared and Sensible Investment: Statement Before the Senate Appropriations Committee*, *id.* 12 (Nov. 1997) (same); MANDELBAUM, *supra* note 20, at 45–65, 156, 164, 173–74 (opposing expansion); Amos Perlmutter & Ted Galen Carpenter, *NATO’S Expensive Trip East*, 77 FOREIGN AFF. 2 (Jan.-Feb. 1998) (same). On Mar. 3, 1998, the Senate Foreign Relations Committee voted to recommend admitting Czech Republic, Hungary and Poland to NATO. Steven Erlanger, *Key Senate Panel Passes Resolution to Broaden NATO*, N.Y. TIMES, Mar. 4, 1998, at A1.
83. See *infra* notes 255–63 and accompanying text.
84. See *supra* note 1 and accompanying text.
85. E.g., *supra* note 22 and accompanying text.
86. Cf. I.C.J. STATUTE, art. 38(1); RESTATEMENT (THIRD), *supra* note 52, §§ 102–03.
87. See F. P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* ch. 4 (1952) for analysis of drafting of the Covenant; *see also supra* note 10 and accompanying text.
88. Vienna Convention on the Law of Treaties, May 23, 1969 art. 29, 1155 U.N.T.S. 331, 339 (Vienna Convention), (restating customary rule that unless a different intention appears from a treaty or is otherwise established, a treaty binds a party as to all its territory); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 89–92 (2d ed. 1984); RESTATEMENT (THIRD), *supra* note 52, § 322 & r.n. 2 (noting colonial empires’ practice to specify territorial application).
89. COVENANT OF THE LEAGUE OF NATIONS art. 1 provided that original Members were States signatory to Treaty of Versailles, *supra* note 10, of which the Covenant was Part I, and other States named in the Covenant Annex, e.g., countries like the Netherlands, were neutral during the war. Other States, Dominions, or colonies could join if the Assembly approved. See also WALTERS, *supra* note 87, at 43–44. For the Assembly’s function, *see infra* notes 91, 94 and accompanying text. The United States signed the Treaty of Versailles, *supra*, but the Senate

never gave advice and consent. See WALTERS, *supra*, ch. 6; *supra* note 10 and accompanying text.

90. COVENANT OF THE LEAGUE OF NATIONS arts. 4(1), 10. For President Woodrow Wilson, Article 10 was the Covenant's key provision. KAGAN, *supra* note 20, at 299; WALTERS, *supra* note 87, at 48–49. The United States was also mentioned but never joined the League. See *supra* notes 10, 89 and accompanying text.

91. *Id.*, arts. 3, 6, 11; see also U.N. CHARTER arts. 97–101; GOODRICH ET AL., *supra* note 5, ch. 15; WALTERS, *supra* note 87, at 44–47, 49.

92. COVENANT OF THE LEAGUE OF NATIONS arts. 12–13, 15; see also WALTERS, *supra* note 87, at 49–53.

93. COVENANT OF THE LEAGUE OF NATIONS arts. 16(1)–16(2); see also WALTERS, *supra* note 87, at 53.

94. COVENANT OF THE LEAGUE OF NATIONS arts. 18–19, countering treaty terms of the previous era, which often enjoined secrecy on parties; see also WALTERS, *supra* note 87, at 54–55; *supra* note 52 and accompanying text.

95. Compare U.N. CHARTER arts. 1(1), 2(4), with COVENANT OF THE LEAGUE OF NATIONS arts. 10–11.

96. Vienna Convention, *supra* note 88, art. 31(1) (treaty interpreted in good faith in accordance with ordinary meaning given terms in their context and in light of its object and purpose); see also RESTATEMENT (THIRD), *supra* note 52, § 325(1); Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 1, 42–48 (1978).

97. Treaty of Versailles, *supra* note 10, arts. 42–44.

98. Agreement Providing for Assistance to France in Event of Unprovoked Aggression by Germany, June 28, 1919, Fr.-U.S., arts. 1–2, 112 Brit. & For. St. Pap. 216–17, 13 AM. J. INT'L L. 411–13 (Supp. 1919); Agreement for Assistance to France in Event of Unprovoked Aggression by Germany, June 28, 1919, Fr.-Gr. Brit., arts. 1–2, *id.* 213–14, 13 AM. J. INT'L L. 414–15 (Supp. 1919), signed the same day as Treaty of Versailles, *supra* note 10.

99. See *supra* notes 10, 89–90 and accompanying text.

100. KAGAN, *supra* note 20, at 297–98; George A. Finch, *A Pact of Non-Aggression*, 27 AM. J. INT'L L. 525, 526 (1933). COVENANT OF THE LEAGUE OF NATIONS art. 21, also provided that nothing in the Covenant would be deemed to affect “validity of international agreements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace.” Article 21 was inserted to try to assure U.S. Senate passage of the Treaty of Versailles, *supra* note 10. President Woodrow Wilson and British Prime Minister David Lloyd George agreed, in exchange, to the treaties, *supra* note 98, that pledged aid to France if Germany attacked her again. Latin American States were not happy with the Monroe Doctrine reference. WALTERS, *supra* note 87, at 55–56.

101. Military Convention, Feb. 21, 1921, Fr.-Pol., art. 1, in J.A.S. GRENVILLE, *THE MAJOR INTERNATIONAL TREATIES 1914–15*, at 116 (1987) (1 GRENVILLE); Treaty of Alliance, Jan. 21, 1924, Czech.-Fr., arts. 1–2, *id.* 117; see also Political Agreement, Feb. 19, 1921, Fr.-Pol., *id.* 116. These agreements were modified by revised alliances (1925) negotiated in connection with Treaty of Mutual Guarantee, Oct. 16, 1925, 54 L.N.T.S. 289 (Locarno Treaty), analyzed *infra* at notes 106–08 and accompanying text. See also KAGAN, *supra* note 20, at 390.

102. E.g., Alliance, Aug. 14, 1920, Czech.-Yugo., art. 1, 6 L.N.T.S. 209, 211; Alliance, Apr. 23, 1921, Czech.-Rom., art. 1, 13 *id.* 231, 233; Defensive Alliance, June 7, 1921, Rom.-Yugo., art. 1, 54 *id.* 257, 259 (collective self-defense from “unprovoked attack”; also providing for consultation); THEODORE I. GESHKOFF, *BALKAN UNION: A ROAD TO PEACE IN SOUTHEASTERN EUROPE* 62–63 (1940) (Entente's weakness was that it did not provide for

defense to unprovoked attack by a great power); 1 GRENVILLE, *supra* note 101, (Entente designed to maintain the Treaties of Neuilly and Trianon, *supra* note 10.). France and Italy also negotiated treaties with Entente States. *Id.* 114–15; L.S. STAVRIANOS, BALKAN FEDERATION 227 (1964).

103. See 12 LEAGUE OF NATIONS O.J. 147-49 (1931), adopting Third Committee, *General Convention to Improve the Means of Preventing War: Report to the Assembly*, League of Nations Doc. A.77.1931.IX (1931), annex. 24, *id.* 237–38; *General Convention to Improve the Means of Preventing War*, League of Nations Doc. A.78.1931.IX (1931), Annex 24(a), *id.* 241; Third Committee, *Draft Report to the Assembly*, League of Nations Doc. A.III.17.1931.IX (1931), Annex 3, 12 LEAGUE OF NATIONS O.J. Spec. Supp. 59-60 (1931); and First Committee Minutes, 12 LEAGUE OF NATIONS O.J. Spec. Supp. 94, at 21–41, 73–74 (1931), adopting *Amendment of the Covenant of the League of Nations in Order to Bring It into Harmony with the Pact of Paris*, Annex 18, *id.* 145, 146. See also *Observations Submitted by Governments*, League of Nations Doc. A.11.1931.V (1931), *id.* 75; *Precis of the Observations Submitted by the Governments Since the Assembly of 1930*, *id.* 92; ALEXANDROV, *supra* note 1, at 37.

104. KAGAN, *supra* note 20, at 307; WALTERS, *supra* note 87, at 223–27, 267–76, 283–85, 288, 291, 362, 384, 710.

105. See *infra* notes 111–26, 202–10 and accompanying text.

106. Locarno Treaty, *supra* note 101, art. 2, 54 L.N.T.S. at 293. See also ALEXANDROV, *supra* note 1, at 44–47; BOWETT, *supra* note 1, at 127–29; KAGAN, *supra* note 20, at 308–15, 335, 355–57, 378. WALTERS, *supra* note 87, at 285–94; *id.* ch. 54 (German denunciation of Locarno, 1936); C.G. Fenwick, *The Progress of Cooperative Defense*, 24 AM. J. INT'L L. 118, 120 (1930) (France concluded guaranty treaties “of the old type” with Czechoslovakia and Poland besides signing Locarno Treaties); Fenwick, *The Legal Significance of the Locarno Agreements*, 20 *id.* 108 (1926); Finch, *supra* note 100, at 727–28 (failure of multilateral 1924 Treaty of Mutual Assistance); Quincy Wright, *The Munich Settlement and International Law*, 33 AM. J. INT'L L. 12, 18 (1939) (German denunciation of Locarno).

107. ALEXANDROV, *supra* note 1, at 45.

108. Locarno Treaty, *supra* note 101, art. 1 (*italics in original*).

109. A party claiming a violation had to bring the case to the League. *Id.*, art. 4.

110. *Id.*, art. 9, imposed no obligations on the British Dominions or India unless they assented. However, the Treaty said nothing about the then-extensive Belgian, French, or Italian possessions or British colonies. Cf. Vienna Convention, *supra* note 88, art. 29; see also *supra* note 88 and accompanying text. See WALTERS, *supra* note 87, ch. 24, for analysis of the Locarno treaties in the context of the Covenant. Germany ended the arrangement in 1936 by denouncing the Treaty. WALTERS, *supra*, ch. 54; Wright, *The Munich*, *supra* note 106.

111. Pact of Paris, *supra* note 11, arts. 1-2. See generally FERRELL, *supra* note 38, at 66–191; DAVID HUNTER MILLER, THE PEACE PACT OF PARIS: A STUDY OF THE BRIAND-KELLOGG TREATY 7–120 (1928) for negotiating history. French Foreign Minister Aristide Briand’s reading CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds. & trans., 1976) may have inspired the Pact. FERRELL, *supra* at 66.

112. U.N. CHARTER art. 103. See also Vienna Convention, *supra* note 88, art. 30; RESTATEMENT (THIRD), *supra* note 52, § 102 cmt. h; § 323 cmt. b; SINCLAIR, *supra* note 88, at 94–98, 184–85.

113. DEPT OF STATE, TREATIES IN FORCE 430–31 (1997) (TIF).

114. See generally Symposium, *State Succession in the Former Soviet Union and in Eastern Europe*, 33 VA. J. INT'L L. 253 (1993); Walker, *Integration and Disintegration*, *supra* note 42.

115. Agreement for Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, art. 2, 59 Stat. 1544-45, 82 U.N.T.S. 280, 282, annexing Charter of International Military Tribunal, art. 6, *id.* 1546, 1547, 82 U.N.T.S. at 286-88 (Nuremberg Charter).

116. *United States v. Goring*, 1 Tr. Maj. War Crim. Before Int'l Mil. Trib. 171, 208, 218-22 (1947), 41 AM. J. INT'L L. 172, 216 (1947) (Nuremberg Judgment); *see also* MCDOUGAL & FELICIANO, *supra* note 1, at 531, 533.

117. G.A. Res. 95(1), U.N. GAOR, 1st Sess., U.N. Doc. A/236, at 1144 (1946). International Law Commission, *Formulation of the Nuremberg Principles*, 1950 2 Y.B. INT'L L. COMM'N 193, 195 reiterated principles of the Pact, the Judgment and the Resolution. For further analysis of the war crimes trials and the 1946 Assembly resolution, *see infra* notes 202-10 and accompanying text. 2 OPPENHEIM, *supra* note 1, § 52fh, at 183, says resort to war is lawful as between Pact parties and non-parties, and presumably a fortiori between two States that are not Pact parties. However, principles of treaty succession, *supra* note 114 and accompanying text, and acceptance of Pact principles as a general customary norm make this claim dubious today. *See supra* notes 115-16, *infra* notes 165, 203-06, and accompanying text.

118. Multilateral Treaty for Renunciation of War: Identic Notes of the Government of the United States to the Governments of Australia et al., June 23, 1928, 22 AM. J. INT'L L. 109 (Supp. 1928). *See also* MILLER, *supra* note 111, at 80-98; WALTERS, *supra* note 87, at 385-86.

119. The result was that the Pact applied to most of the Earth's territory. Cf. Vienna Convention, *supra* note 88, art. 29; *supra* note 88 and accompanying text.

120. *See* 1928(1) FOR. RELS. U.S. 107-24 (1942); *see also* telegram of U.S. Secretary of State Frank B. Kellogg to Myron T. Herrick, U.S. Ambassador to France, June 20, 1928 *in id.* 90, 91. Secretary Kellogg had made nearly verbatim, but unofficial, comments on April 23, 1928, at the American Society of International Law annual meeting. *Address of the Honorable Frank B. Kellogg*, 1928 PROC. AM. SOC'Y INT'L L. 141, 143. Other contemporaries analyzed the Pact in this context. *See generally* FERRELL, *supra* note 38, at 170-191; MILLER, *supra* note 111, at 83-85, 102, 104, 106, 109, 114, 123, 280; Edwin M. Borchard, *The Multilateral Treaty for the Renunciation of War*, 23 AM. J. INT'L L. 116 (1929); Henry M. Stimson, *The Pact of Paris: Three Years of Development*, 11 FOREIGN AFF. i, v. (Special Supp. Oct. 1932). The international academic community, as well as the diplomats clearly understood the Pact and the self-defense reservation. *See also* Louis B. Sohn, *The International Court of Justice and the Scope of the Right of Self-Defense and the Duty of Non-Intervention*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 869, 872-75 (Yoram Dinstein ed., 1988).

121. FERRELL, *supra* note 38, at 193-200; 3 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES 1683 (1945); MCDOUGAL & FELICIANO, *supra* note 1, at 141; MILLER, *supra* note 111, at 111; 2 OPPENHEIM, *supra* note 1, §§ 52fh, 52g; *see also* ALEXANDROV, *supra* note 1, at 58; *but see* Quincy Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L L. 94, 104, 106 (1929); Wright, *The Meaning of the Pact of Paris*, 27 *id.* 39, 43 (1933). The notes debate continued in the U.S. Senate. FERRELL, *supra* at 246-52.

122. Note of UK Ambassador Houghton to Secretary of State Kellogg, May 19, 1928, 1928(1) FOR. RELS. U.S. 67 (1942).

123. *See* ALEXANDROV, *supra* note 1, at 55-56; FERRELL, *supra* note 38, at 179-81; MILLER, *supra* note 111, at 68-69, 117-18, 121-22; WALTERS, *supra* note 87, at 386; Borchard, *supra* note 120, at 118.

124. Note of Soviet Acting Commissar for Foreign Affairs Maxim Litvinov to French Ambassador to Russia Herbert, Aug. 31, 1928, 1928(1) FOR. RELS. U.S. 170, 174 (1942). Four or five other countries objected to inclusion of any reservations, e.g., either the British or the U.S. reservations. See, e.g., Note of Egyptian Minister for Foreign Affairs H. Afifi to U.S. Charge' d'Affaires Winship, Sept. 3, 1928, *id.* 183, 184; note of Turkey's Minister for Foreign Affairs to U.S. Ambassador Joseph C. Grew, Sept. 6, 1928, *id.* 195, 196. BROWNLIE, *USE OF FORCE*, *supra* note 1, at 244, says Afghanistan and Persia raised similar objections; MILLER, *supra* note 111, at 122, also mentions Hungary. Objections to reservations today would apply only to States raising them and the reserving State. Vienna Convention, *supra* note 88, arts. 19–23; Reservations to Convention on Prevention & Punishment of Crime of Genocide, 1951 I.C.J. 15 (Genocide Reservations Case); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 608–11 (4th ed. 1990); T.O. ELIAS, *THE MODERN LAW OF TREATIES* 27–36 (1974); LORD MCNAIR, *THE LAW OF TREATIES* 158–71 (2d ed. 1961); 1 OPPENHEIM'S *INTERNATIONAL LAW*, *supra* note 1, §§ 614–19; RESTATEMENT (THIRD), *supra* note 52, § 313; SINCLAIR, *supra* note 88, at 13, 51–82 (Vienna Convention, *supra*, arts. 19–23, represent progressive development); D.W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT'L L. 67, 88–90 (1976); J.M. Ruda, *Reservations to Treaties*, 146 R.C.A.D.I. 95 (1975).

125. See generally J.E.S. FAWCETT, *THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW* (1963); States: British Commonwealth, 1 WHITEMAN, *DIGEST* § 30.

126. See *supra* note 88 and accompanying text.

127. U.S. Note of April 23, 1928, 1928(1) FOR. RELS. U.S. 34, 36–37 (1942); see also *supra* notes 118–21 and accompanying text.

128. See *supra* note 102 and accompanying text.

129. Pact of Organisation of the Little Entente, Feb. 16, 1933, arts. 10–11, 139 L.N.T.S. 233, 239, citing *inter alia* COVENANT OF THE LEAGUE OF NATIONS; Locarno Treaty, *supra* note 101; Pact of Paris, *supra* note 11; Alliance, Apr. 23, 1921, Czech-Rom., *supra* note 101; Alliance, June 7, 1921, Rom.-Yugo., *supra* note 101; Alliance, Aug. 31, 1922, Czech.-Yugo., reprinted in NORMAN J. PADEFORD, *PEACE IN THE BALKANS* 183 (1935).

130. See *supra* notes 118–27 and accompanying text.

131. Treaty of Mutual Guarantee, Feb. 9, 1934, 153 L.N.T.S. 153; Protocol, Feb. 9, 1934, arts. 1, 3, *id.* 157.

132. See 1 GRENVILLE, *supra* note 101, at 115; *supra* notes 101–02 and accompanying text; see also GESHKOFF, *supra* note 102, chs. 5–12; PADEFORD, *PEACE*, *supra* note 129, chs. 1–4, for history of negotiations.

133. Pan American Union, Apr. 14, 1890, Jan 29, 1902, Aug. 11, 1910, 1 Bevans 129, 344, 752; see also *infra* note 219 and accompanying text.

134. Convention for Maintenance, Preservation and Reestablishment of Peace, Dec. 23, 1936, preamble, 51 Stat. 15 (Peace Convention); see also Additional Protocol Relative to Non-intervention, Dec. 23, 1936, *id.* 41.

135. Convention to Coordinate, Extend and Assure Fulfillment of Existing Treaties Between American States, Dec. 23, 1936, arts. 1–7, 51 *id.* 116, 119–21, citing Treaty to Avoid and Prevent Conflicts Between the American States, May 23, 1923, 44 *id.* 2527 (Gondra Treaty); Pact of Paris, *supra* note 11; General Convention of Inter-American Conciliation, Jan. 5, 1929, 46 Stat. 2209; General Treaty of Inter-American Arbitration, Jan. 5, 1929, 49 *id.* 3153; Treaty of Non-Aggression and Conciliation, Oct. 10, 1933, *id.* 3363 (Saavedra Lamas Treaty); Peace Convention, *supra* note 135. The latter agreement also referred to the Pact of Paris, *supra*.

136. TIF, *supra* note 113, at 414–15, 430–31.

137. See *supra* notes 118–27 and accompanying text.

138. Nyon Arrangement; Agreement Supplementary to the Nyon Arrangement, *supra* note 63; *see also* C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* § 472 (6th ed. 1967); NORMAN J. PADELFORD, *INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE*, ch. 2 (1939); L.F.E. Goldie, *Commentary*, in *THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES* 489 (Natalino Ronzitti ed., 1988) (COLLECTION).

139. *See generally* PADELFORD, *INTERNATIONAL*, *supra* note 138, ch. 2, app. XV; WALTERS, *supra* note 87, at 721, 725-26, for descriptions of attacks.

140. Treaty for Limitation and Reduction of Naval Armaments, Apr. 22, 1930, art. 22, 46 Stat. 2858, 2881-82, 112 L.N.T.S. 65, 88; Proces-Verbal Relating to Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, Nov. 6, 1936, 173 L.N.T.S. 353, 355-57; *see also* Edwin I. Nwogugu, *Commentary*, in *COLLECTION*, *supra* note 138, at 353.

141. Nyon Arrangement, *supra* note 63, ¶¶ 2-3.

142. Goldie, *supra* note 138, at 494.

143. PADELFORD, *INTERNATIONAL*, *supra* note 138, at 49.

144. International Law Association, *Budapest Articles of Interpretation: Final Text*, arts. 2-4, in *INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 38TH CONFERENCE* 66, 67 (1934), *reprinted in Rights and Duties of States in Case of Aggression*, 33 AM. J. INT'L L. 819, 825 n.1 (Supp. 1939).

145. Harvard Draft Convention on Rights and Duties of States in Case of Aggression, 33 AM. J. INT'L L. 819 (Supp. 1939). BOWETT, *supra* note 1, at 161, writing in 1958, said the Draft Convention's principles were *de lege ferenda*. Query whether he would have come to the same conclusion after the relatively full historical record of World War II had been available.

146. George K. Walker, *Maritime Neutrality in the Charter Era*, 17 ANN. PROC. U. VA. CENTER FOR OCEANS L. & POL'Y. 124, 142-46 (1993). *See also* ROBERT E. SHERWOOD, *ROOSEVELT AND HOPKINS: AN INTIMATE HISTORY* chs. 10, 12 (1950 rev. ed.) for a U.S. and diplomatic history perspective on Lend-Lease.

147. 1 SAMUEL ELIOT MORISON, *HISTORY OF UNITED STATES NAVAL OPERATIONS DURING WORLD WAR II: THE BATTLE OF THE ATLANTIC: SEPTEMBER 1939 - MAY 1943*, at 56-113 (1947). President Franklin D. Roosevelt chose the line on July 11, 1941, by ripping a map out of a *National Geographic* magazine and drawing a line for the U.S. Navy's policing area, which included seas east of Greenland and Iceland. SHERWOOD, *supra* note 146, at 308, 310-11.

148. *See generally* SHERWOOD, *supra* note 146, at 308, 310-11, which may recount details of the UK-U.S. arrangement, which was probably informal in nature; *see also* RESTATEMENT (THIRD), *supra* note 52, §§ 301 cmt. b & r.n. 4; 312 r.n. 5.

149. *See* WALTERS, *supra* note 87, chs. 66-67.

150. Treaty of Mutual Assistance, May 2, 1935, Fr.-U.S.S.R., arts. 1-2, 167 L.N.T.S. 395, 404; Treaty of Mutual Assistance, May 16, 1935, Czech.-U.S.S.R., arts. 1-2, 159 *id.* 347, 357; *see also* KAGAN *supra* note 20, at 390.

151. Protocol of Mutual Assistance, May 2, 1935, Mong.-U.S.S.R., arts. 1-2, 140 Brit. & For. St. Pap. 666.

152. Pact of Mutual Assistance, Sept. 28, 1939, Est.-U.S.S.R., art. 1, 198 U.N.T.S. 223, 228; Pact of Mutual Assistance, Oct. 5, 1939, Lat.-U.S.S.R., art. 1, *id.* 381, 386. The USSR also negotiated a pact with Lithuania on Oct. 10, 1939. These agreements' real purpose was in other provisions, granting the USSR bases in these States. 1 GRENVILLE, *supra* note 101, at 182-83, 201.

153. Agreement of Mutual Assistance, Aug. 25, 1939, Pol.-U.K., art. 2, 199 L.N.T.S. 57, 58. A Secret Protocol, Aug. 25, 1939, Pol.-U.K., arts. 1-2, 1 GRENVILLE, *supra* note 101, at 191, defined the Agreement's object as defense against Germany, included the Free City of Danzig within the meaning of contracting parties, and would include Belgium, Estonia, Latvia, Lithuania and the Netherlands once mutual assistance pacts with those States had been concluded. Protocol of Mutual Assistance, Sept. 4, 1939, Fr.-Pol., art. 1, 1 Grenville, *supra* at 192, employed similar language to the Poland-U.K. agreement but did not append a secret protocol, insofar as research reveals. *See also* 1 WINSTON S. CHURCHILL, *THE SECOND WORLD WAR* 397 (1948); 1 GRENVILLE, *supra* at 178-79; WALTERS, *supra* note 87, at 798-99.

154. Treaty of Mutual Assistance, Oct. 15, 1939, Fr.-Turk.-U.K., arts. 1-7, 200 L.N.T.S. 167, 169-71; *see also* 1 CHURCHILL, *supra* note 153, at 551, 703 (Turkey's fear of Soviet attack); 1 GRENVILLE, *supra* note 101, at 179-80.

155. Treaty of Alliance in War Against Hitlerite Germany and Her Associates in Europe and of Collaboration and Mutual Assistance Thereafter, May 26, 1942, U.K.-U.S.S.R., arts. 3-4, 204 L.N.T.S. 353, 356. *See also* Agreement Providing for Joint Action in War Against Germany, July 12, 1941, U.K.-U.S.S.R., *id.* 277; 4 CHURCHILL, *supra* note 153, at 335-36 (1950); 1 GRENVILLE, *supra* note 101, at 204-06.

156. Treaty of Alliance and Mutual Assistance, Dec. 10, 1944, Fr.-U.S.S.R., arts. 1, 3-4, 149 Brit. & For. St. Pap. 632, 633-34. *See also* Treaty of Friendship and Mutual Assistance and Post-War Cooperation, Dec. 12, 1943, Czech-U.S.S.R., art. 3, 145 *id.* 238, 239, which can only be interpreted as applying to reactive measures, since it spoke of a party's being in a future war with Germany. Treaty of Friendship and Alliance, China-U.S.S.R., art. 3, 1 GRENVILLE, *supra* at 237, had similar terms for future war with Japan. *See also id.* 226. Agreement, July 30, 1941, Pol.-U.S.S.R., art. 3, 144 Brit. & For. St. Pap. 869, could only be regarded as a defensive alliance; both States were then at war with Germany. *See also* 1 GRENVILLE, *supra* at 207, 209.

157. Treaty of Alliance, Jan. 29, 1942, art. 3(i), 36 AM. J. INT'L L. SUPP. 175, 176 (1942), 144 Brit. & For. St. Pap. 1017, 1018; *see also* 1 GRENVILLE, *supra* note 101, at 204.

158. Declaration of Panama, *supra* note 13, ¶ 1.

159. Belligerents refused to recognize the zone. Panama Minister for Foreign Affairs Narciso Garay cable to U.S. Secretary of State Cordell Hull, Jan. 26, 1940, enclosing Statement on Behalf of the British Government, Statement on Behalf of the French Government, 1940(1) FOR. RELS. U.S. 689, 690, 693 (1959); Panama Ambassador Jorge E. Boyd cable to Secretary of State Hull, Feb. 16, 1940, enclosing note of German Charge d'Affaires Von Winter to Panama Minister for Foreign Affairs Garay, Feb. 14, 1940, *id.* 696. *Situation III: Contiguous Zones, Airplanes, and Neutrality*, in NAVAL WAR C., INT'L L. SITUATIONS 1939, at 59, 80 (1940) concluded that the Declaration, *supra* note 136, was not a part of international law. *See also* 1 GRENVILLE, *supra* note 101, at 246-47; ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 224-26 (50 Naval War C. Int'l L. Stud., 1957).

160. Agreement Relating to Defense of Greenland, Apr. 7-9, 1941, Den.-U.S., art. 1, 55 Stat. 1245, 1246, 204 L.N.T.S. 135, 137, terminated by Agreement, Apr. 27, 1941, Den.-U.S., 2 U.S.T. 1485; *see also* Agreement Relating to Defense of Greenland, NAVAL WAR C., INT'L L. DOCUMENTS 1940, at 202-13 (1942).

161. Rights and Duties of States, 5 WHITEMAN, DIGEST § 25, at 997, referring to Act of Havana, July 30, 1940, 54 Stat. 2491, cited in Agreement Relating to Defense of Greenland, *supra* note 160, art. 1. *See also* 1 GRENVILLE, *supra* note 101, at 247.

162. Act of Havana, *supra* note 161, at 2502, 2504, referring to Convention Respecting Provisional Administration of European Colonies and Possessions in the Americas, July 30, 1940, 56 *id.* 1273. The Convention, a permanent treaty, superseded the Act, an executive

agreement in U.S. practice but a treaty for other States, in part; the Convention did not assert self-defense rights stated in the Act. It must be presumed that these provisions remained in effect, being cited by Agreement Relating to Defense of Greenland, *supra* note 160, art. 1. See *supra* notes 160-61 and accompanying text.

163. Agreement Respecting Defense of Iceland by United States Forces, July 1, 1941, 55 Stat. 1547, 1549–50, terminated by Exchange of Notes, Oct. 7, 1946, 61 *id.* 2426; see also *Defense of Iceland by United States Forces*, in NAVAL WAR C., INT'L L. DOCUMENTS 1940, at 245–50 (1942).

164. McHugh, *supra* note 1, at 65.

165. See generally GOODRICH ET AL., *supra* note 5, at 1–12; RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER (1958); SIMMA, *supra* note 1, at 2–12.

166. Nuremberg Charter, *supra* note 115; see also *supra* notes 115–16 and *infra* notes 202–10 and accompanying text.

167. See generally ALEXANDROV, *supra* note 1, at 77–79; GOODRICH ET AL., *supra* note 5, at 44, 342–43; MCCORMACK, *supra* note 1, at 153–57, 167–68; RUSSELL, *supra* note 165, at 456, 688–712.

168. Inter-American Reciprocal Assistance and Solidarity (Act of Chapultepec), Mar. 8, 1945, Pts. I(3), I(4), II–III, 60 Stat. 1831, 1839–40; see also Manuel S. Canyes, *The Inter-American System and the Conference of Chapultepec*, 39 AM. J. INT'L L. 504 (1945); Josef L. Kunz, *The Inter-American System and the United Nations Organization*, *id.* 758. The Act was superseded by Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947 (Rio Treaty), 62 Stat. 1681, 21 U.N.T.S. 77 and the end of World War II; see also *infra* notes 218–23 and accompanying text.

169. See *supra* notes 158-62 and accompanying text.

170. See generally ALEXANDROV, *supra* note 1, at 80-93; BOWETT, *supra* note 1, at 182–83; BROWNLIE, USE OF FORCE, *supra* note 1, at 270–71; GOODRICH ET AL., *supra* note 5, at 342–44; RUSSELL, *supra* note 165, at 690–99; STOETZER, *supra* note 17, at 28; Kunz, *Inter-American System*, *supra* note 168.

171. See ALEXANDROV, *supra* note 1, at 95; 2 OPPENHEIM, *supra* note 1, § 52aa, at 155; Robert W. Tucker, *The Interpretation of War under Present International Law*, 4 INT'L L.Q. 11, 29 (1951).

172. See *supra* notes 37-164 and accompanying text.

173. J.B. BRIERLY, THE LAW OF NATIONS 417 (Humphrey Waldock ed., 6th ed. 1963); BROWNLIE, USE OF FORCE, *supra* note 1, at 271–72; GOODRICH ET AL., *supra* note 5, at 344; JESSUP, *supra* note 1, at 166–68; HANS Kelsen, RECENT TRENDS IN THE LAW OF THE UNITED NATIONS 913–14 (1961); D.W. Bowett, *Collective Self-Defense under the Charter of the United Nations*, 32 BRIT. Y.B. INT'L L. 130, 131 (1955); Arthur L. Goodhart, *The North Atlantic Treaty of 1949*, 79 R.C.A.D.I. 187, 192 (1951).

174. Nicaragua Case, *supra* note 1, at 94. See also *id.* at 152–53 (sep. opin. of Singh, Pres.); Sohn, *supra* note 120, at 871.

175. E.g., self-defense principles to justify anti-terrorism and drug trafficking suppression. Geoffrey M. Levitt, *Intervention to Combat Terrorism and Drug Trafficking*, in LAW AND FORCE, *supra* note 1, at 224. Kolosov, *supra* note 1, at 234, proposed a treaty to define self-defense.

176. Cf. I.C.J. STATUTE, art. 38(1); RESTATEMENT (THIRD), *supra* note 52, §§ 102–03, emphasize that treaty law, e.g., the Charter, must be balanced against customary norms, and that custom can develop contrary to treaty-based law and can outweigh treaty law. U.N. CHARTER art. 103 only applies to treaties inconsistent with the Charter. Moreover, *jus cogens* norms may outweigh custom or treaties. If a *jus cogens* norm develops on a track different from a

Charter-based norm or a customary norm based on the Charter, *jus cogens* trumps either. On the other hand, if a Charter-based norm, whether a rule from the Charter as treaty or a parallel customary rule, is *jus cogens*, it trumps other standards. Nicaragua Case, *supra* note 1, at 100, held norms under U.N. CHARTER art. 2(4) approached *jus cogens* status, superseding contrary custom. At least one commentator has argued that the right to self-defense as a *jus cogens* norm may be presumed. Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT'L & COMP. L. 767, 827 (1997). *Jus cogens*' scope varies widely among commentators. See also Vienna Convention, *supra* note 88, arts. 5, 30(1), 53, 64; ELIAS, *supra* note 124, at 177–87; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, §§ 2, 642, 653; SINCLAIR, *supra* note 88, at 17–18, 85–87, 94–95, 160, 184–85, 218–26, 246; RESTATEMENT (THIRD), *supra*, §§ 102 r.n.6, 323 cmt. b, 331(2), 338(2); GRIGORII I. TUNKIN, THEORY OF INTERNATIONAL LAW 98 (William E. Butler trans., 1974); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary Law*, 172 R.C.A.D.I. 219, 262–63 (1981); Jimenez de Arechaga, *supra* note 96, at 64–69; John N. Hazard, *Soviet Tactics in International Lawmaking*, 7 DENV. J. INT'L L. & POL'Y 9, 25–29 (1977); Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995); *supra* note 112 and accompanying text.

177. ALEXANDROV, *supra* note 1, at 101–02, quoting Waldock, *Regulation*, *supra* note 1, at 504, referring to U.N. CHARTER arts. 39–51 (Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression), 52–54 (Regional Arrangements) (*italics in original*).

178. BOWETT, *supra* note 1, at 131; see also ALEXANDROV, *supra* note 1, at 102.

179. ALEXANDROV, *supra* note 1, at 102; GOODRICH ET AL., *supra* note 5, at 179; Waldock, *Regulation*, *supra* note 1, at 504.

180. ALEXANDROV, *supra* note 1, at 102, citing GOODRICH ET AL., *supra* note 5, at 179; Kelsen, LAW OF THE UNITED NATIONS, *supra* note 4, at 796; Waldock, *Regulation*, *supra* note 1, at 504.

181. 2 OPPENHEIM, *supra* note 1, § 52aa, at 155–56; Bowett, *Collective Self-Defence*, *supra* note 173, at 136–40, 159–60.

182. BOWETT, *supra* note 1, at 216–20; JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 245 (1959 rev.); Bowett, *Collective Self-Defence*, *supra* note 173, at 139–40.

183. ALEXANDROV, *supra* note 1, at 102; GOODRICH ET AL, *supra* note 5, at 348; Kelsen, LAW OF THE UNITED NATIONS, *supra* note 4, at 792; MCDUGAL & FELICIANO, *supra* note 1, at 250. J.G. STARKE, THE ANZUS TREATY ALLIANCE 98–99 (1965) says Security Treaty, Sept. 1, 1951, pmbl., 3 U.S.T. 3420, 3422, 131 U.N.T.S. 83, 84 (ANZUS Pact) memorialized informal arrangements after World War II and during the Korean War. See also TREVOR R. REESE, AUSTRALIA, NEW ZEALAND AND THE UNITED STATES: A SURVEY OF INTERNATIONAL RELATIONS, chs. 2, 4 (1969); W. DAVID MCINTYRE, BACKGROUND TO THE ANZUS PACT, chs. 9–10 (1995); *infra* notes 239–43 and accompanying text. A theory of informal collective self-defense arrangements also supports, e.g., actions of states assisting South Korea or maintaining naval forces between Taiwan and the China mainland during the Korean War, or countries supporting the United Kingdom during the Falklands/Malvinas War. See generally George K. Walker, *State Practice Since World War II: 1945–1990*, in THE LAW OF NAVAL WARFARE: TARGETING ENEMY MERCHANT SHIPPING 121, 125–30, 153–55 (65 Naval War C. Int'l L. Stud., Richard J. Grunawalt ed. 1993).

184. ALEXANDROV, *supra* note 1, at 103; GOODRICH ET AL., *supra* note 5, at 348.

185. ALEXANDROV, *supra* note 1, at 103; Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 218–21 (1985); Waldock,

Regulation, *supra* note 1, at 505. The right to assist another State is not an inherent right. Kelsen, *LAW OF THE UNITED NATIONS*, *supra* note 4, at 797. This is consistent with one view of the law of treaties, which declares that treaty parties cannot agree to confer a benefit (here, aiding a target State) without beneficiary consent. RESTATEMENT (THIRD), *supra* note 52, § 324(3). Under this view, if an assisting State and a target State are UN Members, the target state has a potential benefit if assisted under U.N. CHARTER art. 51, a treaty provision; the target must request help. Vienna Convention, *supra* note 88, art. 36(1), is the same as the RESTATEMENT view but adds that unless a treaty provides otherwise, assent is presumed. Under this approach, an assisting State could assume that a benefit—help against an attacking State—is presumed under the Article 51 collective self-defense. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, § 627, at 1264, says the Charter is an exception to the rule that a treaty (the Charter) cannot impose benefits on a State not party, i.e., a State that is not a UN Member. However, this does not affect the Article 51 request rule among UN Members. Requiring a request is the safer course; otherwise an assisting State may be accused of violating U.N. CHARTER art. 2. *See also* 1 OPPENHEIM'S INTERNATIONAL LAW, *supra*, § 626; SINCLAIR, *supra* note 88, at 98–106.

186. *See generally*, e.g., *supra* note 1 for different views of the United States, which has an anticipatory self-defense policy and the USSR, which held a restrictive view.

187. *See*, e.g., *supra* note 3; commentators disagree on the legality of the 1981 Israeli raid on the Iraq reactor. *Compare*, e.g., ALEXANDROV, *supra* note 1, at 159–65, with MCCORMACK, *supra* note 1, at 285–302.

188. Unless a treaty provides otherwise, it remains in effect a year after a notice of denunciation is filed. *See generally* Vienna Convention, *supra* note 88, arts. 56–58; International Law Commission, Report on the Work of its Eighteenth Session, *Report of the Commission to the General Assembly*, U.N. Doc. A/6309/Rev. 1, reprinted in 2 Y.B. INT'L L. COMM. 171, 250–51 (1974 (ILC Rep.)); BROWNLIE, PRINCIPLES, *supra* note 124, at 617; MCNAIR, *supra* note 124, chs. 32–33; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, § 647; RESTATEMENT (THIRD), *supra* note 52, §§ 332–33; SINCLAIR, *supra* note 88, at 183–88.

189. Claim of a material breach, without notice and other procedures, does not entitle a claimant to say a treaty is terminated. *See* ILC Rep., *supra* note 188, at 253–55. Claims of breach must go to the heart of an agreement. Special rules apply to multilateral treaties. Vienna Convention, *supra* note 88, art. 60; Advisory Opinion on Namibia, 1971 I.C.J. 16, 46–47; Jurisdiction of ICAO Council (India v. Pak.), 1972 I.C.J. 46, 67; BROWNLIE, PRINCIPLES, *supra* note 124, at 618–19; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, § 649; RESTATEMENT (THIRD), *supra* note 52, § 335; SINCLAIR, *supra* note 88, at 20, 166, 188–90.

190. E.g., a State with a strong anticipatory self-defense policy assisting a reactive self-defense policy State insisting on reactive self-defense aid might claim that reactive aid only would endanger its forces, configured for anticipatory self-defense, and that this amounts to a fundamental change of circumstances because its self-defense preparations are keyed to use in an anticipatory mode. For further analysis of fundamental change of circumstances, *see* Vienna Convention, *supra* note 88, art. 62; Fisheries Jurisdiction (Ice. v. U.K.), 1973 I.C.J. 3, 18; BROWNLIE, PRINCIPLES, *supra* note 124, at 620–21; ARIE E. DAVID, THE STRATEGY OF TREATY TERMINATION, ch. 1 (1975); ELIAS, *supra* note 124, at 119–28; ILC Rep., *supra* note 188, at 257–58; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, § 651; RESTATEMENT (THIRD), *supra* note 52, § 336; SINCLAIR, *supra* note 88, at 20, 192–96; Gyorgy Haraszti, *Treaties and the Fundamental Change of Circumstances*, 146 R.C.A.D.I. 1 (1975); Oliver J. Lissitzyn, *Treaties and Changed Circumstances*, 61 AM. J. INT'L L. 895 (1967).

191. E.g., a State with a strong anticipatory self-defense policy assisting a reactive self-defense policy State that insists on reactive self-defense aid might claim that reactive

self-defense aid would endanger its forces, configured for anticipatory self-defense, and that because this is the only way that these forces can operate, performance under the agreement is impossible. For further analysis of impossibility of performance, see Vienna Convention, *supra* note 88, art. 61; ELIAS, *supra* note 124, at 128-30; ILC Rep., *supra* note 188, at 255-56; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, § 650; SINCLAIR, *supra* note 88, at 190-92.

192. See, e.g., *supra* notes 3, 187 for differing views of commentators on the validity of claims of anticipatory self-defense claims for specific operations.

193. See *supra* notes 189-91 and accompanying text.

194. See Vienna Convention, *supra* note 88, arts. 19-23; *supra* note 124.

195. This is like the rule of regression to common denominator when States rely on custom and there are objectors. See generally BROWNLIE, PRINCIPLES, *supra* note 124, at 10; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, § 10, at 29; RESTATEMENT (THIRD), *supra* note 52, § 102 cmts. b, d; Michael Akehurst, *Custom As a Source of Law*, 47 BRIT Y.B. INT'L L. 1, 23-27 (1974); C.H.M. Waldock, *General Course on Public International Law*, 106 R.C.A.D.I. 1, 49-53 (1962); but see Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 538-41 (1993) (existence of persistent objector rule open to serious doubt). J. ASHLEY ROACH & ROBERT W. SMITH's, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996), an exhaustive study of objections to law of the sea claims indicates that the persistent objector rule is alive and well, at least for law of the sea issues. Undoubtedly, there are thousands of protests filed annually on many issues in the chancelleries, few if any of which are published. It cannot, therefore, be assumed, as some commentators do, that the rule of the persistent objector is in disuetude.

196. Cf. BROWNLIE, PRINCIPLES, *supra* note 124, at 611; RESTATEMENT (THIRD), *supra* note 52, § 313 cmt. b.

197. See, e.g., Genocide Reservations Case, *supra* note 124, 1951 I.C.J. at 32 (Guerrero, Vice Pres.; Hsu Mo, McNair, Read, JJ., dissenting); BROWNLIE, PRINCIPLES, *supra* note 124, at 609; MCNAIR, *supra* note 124, at 169; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, § 616, at 1245; RESTATEMENT (THIRD), *supra* note 52, § 313 r.n.1; SINCLAIR, *supra* note 88, at 54-55.

198. See *infra* notes 216-63 and accompanying text.

199. See *supra* notes 189-91 and accompanying text. Although Iceland claims of fundamental change in law were rejected, Fisheries Jurisdiction, *supra* note 164, at 16-21, did not discount the possibility that a large enough change in law could be grounds for a change of circumstances claim.

200. Asylum (Colom. v. Peru), 1950 I.C.J. 266, 277; Right of Passage Over Indian Terr. (Port. v. India), 1960 I.C.J. 6; BROWNLIE, PRINCIPLES, *supra* note 124, at 9-10; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 1, § 10, at 30; RESTATEMENT (THIRD), *supra* note 52, § 102 cmt. e.

201. ROE state options for, and possibly limits on, actions a commander may take in armed conflict situations. In U.S. practice, commanders are strongly reminded of their duty to defend their ship, unit, etc., i.e., to exercise self-defense, including anticipatory self-defense, pursuant to U.S. policy. See generally BRADD C. HAYES, NAVAL RULES OF ENGAGEMENT: MANAGEMENT TOOLS FOR CRISIS (1989); J. Ashley Roach, *Rules of Engagement*, 36 NAVAL WAR C. REV. 46 (Jan.-Feb 1983), reprinted in 14 SYRACUSE J. INT'L L. & COM. 865 (1988); Ivan A. Shearer, *Rules of Engagement and the Implementation of the Law of Naval Warfare*, id. 767 (1988); *supra* note 1.

202. See *supra* notes 10, 111-27 and accompanying text. MCCORMACK, *supra* note 1, at 253-61, has extensive, helpful analysis of the trials; see also ALEXANDROV, *supra* note 1, at 73-76.

203. Nuremberg Judgment, *supra* note 116, 17 Tr. Maj. War Crim. Before Int'l M. Trib. 458, 469 (1948) (argument of Prof. Dr. Hermann Jahreiss, counsel for defendant Albert Jodl).

204. See *supra* note 23 and accompanying text.

205. The Tribunal also dismissed arguments, based on Secretary of State Kellogg's comments on the self-defense reservation to the Pact of Paris, *supra* note 11, that Germany alone could judge legitimacy of its self-defense claim. Nuremberg Judgment, *supra*, 1 Tr. Maj. War Crim. Before Int'l M. Trib. at 208, 218–22, 41 AM. J. INT'L L. at 205, 207. See MCCORMACK, *supra* note 1, at 254–56; *supra* notes 111–27 and accompanying text.

206. BOWETT, *supra* note 1, at 143; see also MCCORMACK, *supra* note 1, at 254–56.

207. Cf. Hague III, *supra* note 38, arts. 1, 3. Japan had ratified Hague III in 1911, the Netherlands in 1909. DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 60 (3d ed. 1988).

208. United States v. Araki, Judgment of the International Military Tribunal for the Far East (Nov. 4–12, 1948), reprinted in 1 B.V.A. ROLING & C.F. RUTER, THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (I.M.T.F.E.) 29 APRIL 1946–12 NOVEMBER 1948, at 15, 21, 382 (1977); *supra* notes 17, 33–35, 183 and accompanying text; see also ALEXANDROV, *supra* note 1, at 76; MCCORMACK, *supra* note 1, at 258–59.

209. G.A. Res. 95(1), *supra* note 117.

210. I.C.J. STATUTE, art. 38(1)(d); RESTATEMENT (THIRD), *supra* note 52, § 103(2). Most municipal legal systems recognize a right of anticipatory self-defense. MCCORMACK, *supra* note 1, at 271. This adds more weight to a view that the right exists in international law. I.C.J. STATUTE, art. 38(1)(c); but see RESTATEMENT (THIRD), *supra*, § 103(2).

211. See *supra* notes 63, 138–43 and accompanying text.

212. See *supra* notes 149–63 and accompanying text.

213. See *supra* notes 17, 33–35, 138–43, 149–59, 183, 208 and accompanying text.

214. See *supra* notes 167–85 and accompanying text.

215. See *supra* notes 202–84 and accompanying text.

216. Part IV does not examine practice under the agreements. Others have. See generally, e.g., ALEXANDROV, *supra* note 1, at 215–90; GOODRICH ET AL., *supra* note 5, at 345–48; MCCORMACK, *supra* note 1, at 211–39, and sources cited. These discuss better-known situations. JAMES CABLE, GUNBOAT DIPLOMACY 1919–1991 at 178–213 (4th ed. 1994) demonstrates that smaller incidents since 1945 that may involve bilateral or occasionally multilateral responses may supply more content to practice than is now available. Part IV does not consider the right, recognized under the Charter and in pre-Charter times, for States to use arrangements less formal than a treaty to assert collective self-defense, including anticipatory self-defense. See *supra* notes 17, 33–35, 83, 208, 213 and accompanying text.

217. ALEXANDROV, *supra* note 1, at 102; Tucker, *supra* note 171, at 33.

218. See *supra* notes 167–70 and accompanying text.

219. Compare Rio Treaty, *supra* note 168, art. 3(1), with Act of Chapultepec, *supra* note 168, Pts. I(3), III. The Treaty applies within North and South America and adjoining oceans. Rio Treaty, *supra*, arts. 3(3), 4. Act of Chapultepec, *supra*, Pts. I(3), III, had provisions similar to the Treaty, art. 3(1), but the Act declared that provisions were subject to the projected international organization, i.e., the United Nations, and had no specific geographic parameters of application, although the whole tenor of the Act pointed toward Western Hemisphere self-defense. Cf. Canyes, *supra* note 168, at 506. See also Charter of the Organization of American States, Apr. 30, 1948 (OAS Charter), 2 U.S.T. 2394, 119 U.N.T.S. 3, amended by Protocol, Feb. 27, 1967, 21 U.S.T. 607; Protocol, Dec. 5, 1985, 21 I.L.M. 533 (1985), replacing Pan American Union, *supra* note 133, in place when Act of Chapultepec, *supra*, was signed. The 1985 OAS protocol is not in

force for all members, including the United States. M.J. BOWMAN & D.J. HARRIS, *MULTILATERAL TREATIES: INDEX AND CURRENT STATUS* 177 (11th Cum. Supp. 1995). For history of inter-American relations in the Pan American Union, OAS and Rio Treaty contexts, see generally M. MARGARET BALL, *THE OAS IN TRANSITION* (1969); GORDON CONNELL-SMITH, *THE INTER-AMERICAN SYSTEM* (1966); STOETZER, *supra* note 17; ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., *THE ORGANIZATION OF AMERICAN STATES* (1963); Charles G. Fenwick, *The Inter-American Regional System: Fifty Years of Progress*, 50 AM. J. INT'L L. 18 (1956).

220. See *supra* notes 167-70, 218 and accompanying text.

221. Rio Treaty, *supra* note 168, art. 3(2). at 96-97; Act of Chapultepec, *supra* note 168, had no counterpart.

222. Rio Treaty, *supra* note 168, art. 3(4). at 97; see also *id.*, art. 5, 62 Stat. at 1701, 21 U.N.T.S. at 97; U.N. CHARTER, art. 51. Rio Treaty, *supra*, art. 1, pledges that parties will not threaten or use force inconsistent with the Charter. Cf. U.N. CHARTER, arts. 2(4), 103; *supra* notes 112, 176 and accompanying text.

223. Rio Treaty, *supra* note 168, art. 6. *Id.*, art. 9, defined aggression as including

a. Unprovoked armed attack by a State against the territory, the people, or the land, sea or air forces of another State; [and]

b. Invasion, by the armed forces of a State, of the territory of an American State, through the trespassing of boundaries demarcated in accordance with a treaty, judicial decision, or arbitral award, or, [absent] . . . frontiers thus demarcated, invasion affecting a region . . . under the effective jurisdiction of another State.

Compare Act of Chapultepec, *supra* note 168, Pts. I(3)–I(4).

224. Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Mar. 17, 1948, art. 4, 19 U.N.T.S. 51, 57 (WEU Treaty), amended by Protocol Modifying Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-Defence, Oct. 23, 1954, 211 *id.* 342 (WEU Protocol I); Protocol on Forces of Western European Union, Oct. 23, 1954, *id.* 358 (WEU Protocol II); Protocol on Control of Armaments, with Annexes, Oct. 23, 1954, *id.* 364; Protocol on the Agency of Western European Union for Control of Armaments, Oct. 23, 1954, *id.* 376; and other protocols in 1990 and 1992, which do not amend art. 4. See BOWMAN & HARRIS, *supra* note 219, at 177 (11th Cum. Supp. 1995).

225. WEU Treaty, *supra* note 224, art. 7.

226. Compare *id.* with WEU Protocol I, *supra* note 224, art. 4.

227. Nothing in the Treaty can be interpreted as affecting the Council's authority and responsibility under the Charter to take action it deems necessary to maintain or restore international peace and security. WEU Treaty, *supra* note 224, art. 5.

228. WEU Protocol II, *supra* note 224.

229. WEU Protocol I, *supra* note 224, art. 3. The WEU was moribund for more than thirty years, existing in the shadow of NATO, but it was revitalized in 1986 to meet issues arising out of the Iran-Iraq war in the Persian Gulf. *Europe's Multilateral Organizations*, 3 DEP'T ST. DISPATCH 351, 354 (1992). The European Union has recognized WEU's security role. See generally Walker, *Integration and Disintegration*, *supra* note 42, at 15–17.

230. See generally ALFRED CAHEN, *THE WESTERN EUROPEAN UNION AND NATO* 1016 (1989); *THE CHANGING FUNCTIONS OF THE WESTERN EUROPEAN UNION (WEU)* xiii-xxx (Arie Bloed & Ramses A. Wessel eds., 1994); STANLEY R. SLOAN, *NATO's FUTURE: TOWARD*

A NEW TRANSATLANTIC BARGAIN 173–75 (1985). Treaty of Dunkirk, *supra* note 63, had been a WEU predecessor; other European States' desire to accede was a catalyst for WEU. COOK, *supra* note 63, at 116, 122, 259–60. Ironically, a European Defense Community had been contemplated as part of the then European Economic Community; it would have been “exclusively defensive,” but would have allowed response to any “armed aggression” against a member State or European Defense Forces constituted under the Treaty. The Treaty pledged cooperation with the North Atlantic Treaty Organization. Treaty Constituting the European Defence Community, May 27, 1952, arts. 2, 5, *reprinted in* NAVAL WAR C., INTERNATIONAL LAW DOCUMENTS 1952–53, at 147, 148–49 (1954); Karl Lowenstein, *Sovereignty and International Co-Operation*, 48 AM. J. INT'L L. 222, 237–38 (1954). The Treaty failed of ratification. U.S. Secretary of State John Foster Dulles, Statement to U.S. Senate Armed Services Committee, 32 DEPT ST. BULL. 605, 606 (1955). The United States had not opposed the Treaty. Message of the President of the United States Stating United States Position on Relation between the European Defense Community and the North Atlantic Treaty Organization, Apr. 16, 1954, N.Y. TIMES, Apr. 17, 1954, *reprinted in* NAVAL WAR C., *supra* at 232.

231. WEU Statement on Recent Events in the Gulf, Apr. 19, 1988, in CHANGING, *supra* note 210, at 81; CAHEN, *supra* note 230, at 47–50.

232. Article 6 defined the territory of the parties covered by Article 5. North Atlantic Treaty, *supra* note 82, arts. 5–6, modified as to territory covered by Protocol on Accession of Greece and Turkey, *supra* note 82; Protocol on Accession of Federal Republic of Germany, *supra* note 82; Protocol on Accession of Spain, *supra* note 82. These protocols do not affect the substance of other terms of the North Atlantic Treaty, *supra*. Currently NATO is in the process of admitting new members in Eastern Europe. *See supra* note 82.

233. North Atlantic Treaty, *supra* note 82, art. 7; *see also* U.N. CHARTER arts. 2(4), 103; *supra* notes 112, 176 and accompanying text.

234. North Atlantic Treaty, *supra* note 82, art. 4; *see also* HARLAN CLEVELAND, NATO: THE TRANSATLANTIC BARGAIN 13–33 (1970) (“golden rule of consultation”). For NATO origins and development, *see* COOK, *supra* note 63; ALFRED GROSSER, THE WESTERN ALLIANCE: EUROPEAN-AMERICAN RELATIONS SINCE 1945 (Michael Shaw trans. 1980); ROBERT ENDICOTT OSGOOD, NATO: THE ENTANGLING ALLIANCE (1962); SLOAN, *supra* note 230; John Duffield, *The North Atlantic Treaty Organization: Alliance Theory*, in NGAIRE WOODS, EXPLAINING INTERNATIONAL RELATIONS SINCE 1945, ch. 15 (Ngaire Woods ed., 1996); Goodhart, *supra* note 173.

235. Treaty of Joint Defence and Economic Co-operation between Arab States, with Military Annex, June 17, 1950, art. 2, 157 Brit. & For. St. Pap. 669-70, 49 AM. J. INT'L L. SUPP. 51 (1955) (Arab League Joint Defense Treaty). *See also* Pact of League of Arab States, Mar. 22, 1945, 70 U.N.T.S. 238; HUSSEIN A. HASSOUNA, THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES, ch. 1 (1975); MAJID KHADDURI, THE GULF WAR: THE ORIGINS AND IMPLICATIONS OF THE IRAQ-IRAN CONFLICT 140 (1988); ROBERT W. MACDONALD, THE LEAGUE OF ARAB STATES (1965); Khadduri, *The Arab League As a Regional Arrangement*, 40 AM. J. INT'L L. 756 (1946).

236. U.N. CHARTER art. 103; *see also supra* notes 112, 176 and accompanying text.

237. Arab League Joint Defense Treaty, *supra* note 235, art. 3, 157 Brit. & For. St. Pap. at 670, 49 AM. J. INT'L L. SUPP. at 52.

238. *Id.*, Military Annex, art. 1(a), 157 Brit. & For. St. Pap. at 672, 49 AM. J. INT'L L. SUPP. at 53.

239. STARKE, *supra* note 183, at 77.

240. ANZUS Pact, *supra* note 183, art. 3, suspended for New Zealand Sept. 1, 1986. MCINTYRE, *supra* note 183, at 403–05; TIF, *supra* note 113, at 350. For analysis of New Zealand's refusal to admit ships with nuclear capability and ANZUS future prospects, see generally JACOB BERCOVITCH, ANZUS IN CRISIS (1988); FRANK P. DONNI, ANZUS IN REVISION (1991); MICHAEL C. PUGH, THE ANZUS CRISIS, NUCLEAR VISITING AND DETERRENCE (1989); THOMAS-DURRELL YOUNG, AUSTRALIAN, NEW ZEALAND, AND UNITED STATES SECURITY RELATIONS, 1951–1986 (1992); W. Keith Jackson & James W. Lamare, *The ANZUS Conflict and New Zealand Politics*, in INTERNATIONAL CRISIS AND DOMESTIC POLITICS 53 (Lamare ed., 1991); Jock Phillips, *New Zealand and the ANZUS Alliance: Changing National Self-Perceptions*, in AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES: INTERNAL CHANGE AND ALLIANCE RELATIONS IN THE ANZUS STATES 183 (Richard W. Baker ed., 1991); James N. Rosenau, *Peripheral International Relationships in a More Benign World: Reflections on American Orientations Toward ANZUS*, in *id.* 203.

241. ANZUS Pact, *supra* note 183, art. 4. Like the Rio Treaty and the NATO Agreement, the ANZUS Pact, *supra*, art. 5, limits its territorial scope to attacks on parties' metropolitan territories, island territories under their jurisdiction, or their armed forces, public vessels or aircraft in the Pacific.

242. Compare ANZUS Pact, *supra* note 183, art. 4, with North Atlantic Treaty, *supra* note 82, art. 5. Similar to the Rio and North Atlantic Treaties, *supra* notes 82, 168. ANZUS Pact, *supra*, art. 5, limits its territorial scope to attacks on parties' metropolitan territories, island territories under their jurisdiction, and parties' armed forces, public vessels or aircraft in the Pacific. See also MCINTYRE, *supra* note 183, chs. 11–15; REESE, *supra* note 183, ch. 8; STARKE, *supra* note 183, chs. 1–2; Leicester C. Webb, *Australia and SEATO*, in SEATO: SIX STUDIES 47, 50–57 (George Modelski ed., 1964). As of 1965, there had been no NATO-ANZUS liaison. STARKE, *supra* at 226–28.

243. STARKE, *supra* note 183, at 121.

244. It did not include application to parties' armed forces or public vessels or aircraft. Southeast Asia Collective Defense Treaty, with Protocol, Sept. 8, 1954, arts. 4, 8, 6 U.S.T. 81, 83–84, 209 U.N.T.S. 28, 30, 32 (SEATO Treaty); see also LESZEK BUSZYNSKI, SEATO: THE FAILURE OF AN ALLIANCE STRATEGY chs. 1–2 (1983); STARKE, *supra* note 183, at 221–26; George Modelski, *SEATO: Its Function and Organization*, in SEATO, *supra* note 242, at 8–45.

245. Pacific Charter, Sept. 8, 1954, 6 U.S.T. 91, 209 U.N.T.S. 23, 24.

246. BOWMAN & HARRIS, *supra* note 219, at 196; BUSZYNSKI, *supra* note 244, ch. 6.

247. TIF, *supra* note 113, at 350.

248. Treaty of Alliance, Political Cooperation and Mutual Assistance, Aug. 9, 1954, 211 U.N.T.S. 237 (Second Balkan Pact), partial successor to the Little Entente, *supra* note 129; a cooperation and friendship treaty among Greece, Turkey and Yugoslavia had been signed a year later. By 1956 the arrangement was in ruins; by 1962 it was a dead letter. See generally JOHN O. IATRIDES, BALKAN TRIANGLE (1968); see also J.A.S. GRENVILLE & BERNARD WASSERSTEIN, THE MAJOR INTERNATIONAL TREATIES SINCE 1945, at 390–91 (1987) (2 GRENVILLE); Gerhard Bebr, *Regional Organizations: A United Nations Problem*, 49 AM. J. INT'L L. 166, 182 (1955).

249. Obligations under the Pact were subject to those owed other alliances, e.g., the North Atlantic Treaty, *supra* note 82, for Greece or Turkey; the Pact required consultation among members for conflicts in these obligations. Compare Second Balkan Pact, *supra* note 248, arts. 2, 6–7, 10, with Pact of Organisation of Little Entente, *supra* note 129, arts. 10–11; Protocol, *supra* note 130, arts. 1, 3. Whether consultation was a prerequisite before action is debatable; a foreign minister for a party State said that consultation would not be an obstacle, since all joint plans had

been prepared and would be applied when joint measures were decided. IATRIDES, *supra* note 248, at 139.

250. Pact of Mutual Co-operation, Feb. 24, 1955, art. 1, 233 U.N.T.S. 199, 212 (Baghdad Pact). *See also* Declaration Respecting Baghdad Pact, July 28, 1958, ¶ 1, 9 U.S.T. 1077, 335 U.N.T.S. 205, 206, declaring parties' "determination to maintain their collective security and to resist aggression, direct or indirect." *See* ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, THE BAGHDAD PACT: ORIGINS AND POLITICAL SETTING (Feb. 1956); Brian Holden Reid, *The "Northern Tier" and the Baghdad Pact*, in THE FOREIGN POLICY OF CHURCHILL'S PEACETIME ADMINISTRATION 1951–55, at 159–74 (John W. Young ed., 1988); Margaret Muryani Manchester, *The Tangled Web: The Baghdad Pact, Eisenhower, and Arab Nationalism* chs. 1–3 (1994) (unpublished Ph.D. dissertation, Clark Univ.) (in Naval War College Library) for the Pact's origins and history.

251. There was no territorial limitation, although the treaty's being limited to Arab League members in effect excluded all but the Middle East and northern Africa. Baghdad Pact, *supra* note 250, arts. 2, 5.

252. The United States was a "de facto" member but not a Pact party. *See* Declaration Respecting the Baghdad Pact, *supra* note 250; BOWMAN & HARRIS, *supra* note 219, at 196; Reid, *supra* note 250, at 159–80; Manchester, *supra* note 250, at 336–45.

253. Cf. Protocol, Mar. 31, 1991, BOWMAN & HARRIS, *supra* note 219, at 196 (11th Cum. Supp. 1995).

254. Compare Treaty of Friendship, Co-operation and Mutual Assistance, May 14, 1955, art. 4, 219 U.N.T.S. 24, 28 (Warsaw Pact), with North Atlantic Treaty, *supra* note 82, arts. 5, 7. For analysis of origins and practice under the Pact, *see generally* NEIL FODOR, THE WARSAW TREATY ORGANIZATION: A POLITICAL AND ORGANIZATIONAL ANALYSIS (1990); J.P. JAIN, DOCUMENTARY STUDY OF THE WARSAW PACT 1–39 (1973). Mark Kramer, *The Soviet Union and Eastern Europe: Spheres of Influence*, in WOODS, *supra* note 234, ch. 5, is an overview of the Soviet system, including the Pact.

255. Compare Warsaw Pact, *supra* note 254, with North Atlantic Treaty, *supra* note 82, art. 4.

256. Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, art. 4, 3 U.S.T. 3947, 3950, 177 U.N.T.S. 133, 136 (Philippines Defense Treaty).

257. *Id.*, art. 5.

258. *Id.*, art. 3.

259. Compare Mutual Defense Treaty, Repub. of Korea-U.S., with understanding, Oct. 1, 1953, arts. 2–3, 5 U.S.T. 2368, 2372–73, 238 U.N.T.S. 199, 203–04, with Philippines Defense Treaty, *supra* note 256, arts. 3–5.

260. Treaty of Mutual Cooperation and Security, with Agreed Minute and Exchange of Notes, Japan-U.S., Jan. 19, 1960 (Japan Defense Treaty), arts. 4–5, 11 *id.* 1632, 1634, 373 U.N.T.S. 179, 188, with Philippines Defense Treaty, *supra* note 256, arts. 3–5, 11 *id.* 3950, 177 U.N.T.S. at 136. Japan Defense Treaty, *supra*, replaced Security Treaty, Japan-U.S., Sept. 8, 1951, 3 U.S.T. 3329, 136 U.N.T.S. 211. Japan has moved to a policy of offshore land, sea and air defense from its earlier strategy of defense at the water's edge. *See generally* Japan-United States, *Joint Statement on Review of Defense Cooperation Guidelines and Defense Cooperation Guidelines*, Sept. 23, 1997, reprinted in 36 I.L.M. 1621 (1997); PETER J. KATZENSTEIN, CULTURAL NORMS AND NATIONAL SECURITY: POLICE AND MILITARY IN POSTWAR JAPAN 132–39 (1996); Mike M. Mochizuki, *A New Bargain for a Stronger Alliance*, in MIKE M. MOCHIZUKI, TOWARD A TRUE ALLIANCE: RESTRUCTURING U.S.-JAPAN SECURITY RELATIONS, ch. 1 (1997). This shift seems to mark a change to a more anticipatory self-defense mode. Mutual Defense Treaty, Repub. of

China-U.S., Dec. 2, 1954, with U.S. Reservations, arts. 4-5, 6 U.S.T. 433, 436 248 U.N.T.S. 213, 215 included the same kind of terms as the Japan Treaty; the United States denounced it when it recognized the People's Republic of China. See generally *Goldwater v. Carter*, 444 U.S. 996 (1979). See also 2 GRENVILLE, *supra* note 248, at 109–113, noting U.S. Senate reservations to the China treaty forbade U.S. action unless China were forced to fight in self-defense or territorial extension of the U.S. commitment without Senate approval. If the United States negotiated formal agreements with Persian Gulf states other than Kuwait after Iraq's invasion of Kuwait in 1990, these bilateral treaties may provide for anticipatory collective self-defense. The Kuwait-U.S. agreement was a reactive defense treaty, since it had been invaded by the time the United States negotiated with Kuwait. These treaties have not been and may never be published for national security reasons. See George K. Walker, *The Crisis Over Kuwait, August 1990 - February 1991*, 1991 Duke J. Comp. & Int'l L. 25, 29–30; RESTATEMENT (Third), *supra* note 52, § 312 r.n.5; see also *supra* note 52.

261. See, e.g., Treaty of Friendship and Mutual Assistance, Mar. 18, 1948, Bulg.-USSR, art. 2, 48 U.N.T.S. 135, 144 (If either party is "involved in hostilities with a Germany which might seek to renew its policy of aggression or with any other State . . . associated with Germany in a policy of aggression either directly or indirectly or in any other way, the other . . . shall immediately extend to the . . . Party involved in hostilities military and other assistance with all the means at its disposal[,] subject to the Charter); Treaty of Friendship, Mutual Assistance and Cooperation, June 12, 1964, Ger. Dem. Rep.-USSR, art. 5, 3 I.L.M. 754, 756 (1965); (treaty subject to Warsaw Pact, *supra* note 254); see also FODOR, *supra* note 254, at 5–6, 188–91; 2 GRENVILLE, *supra* note 248, at 185; JAIN, *supra* note 254, at 13-14; Bowett, *Collective Self-Defence*, *supra* note 173, at 144; W.W. Kulski, *The Soviet System of Collective Security Compared with the Western System*, 44 AM. J. INT'L L. 453 (1950). Treaty of Friendship, Alliance and Mutual Assistance, Feb. 14, 1950, People's Rep. China-USSR, art. 1, 226 U.N.T.S. 3, 12-14, had language like the Bulgaria treaty, but said Japan was the potential adversary. See also 2 GRENVILLE, *supra* at 158–59. USSR satellites also negotiated agreements among themselves, subject to the Warsaw Pact, *supra*, e.g., Treaty on Friendship, Cooperation and Mutual Assistance, Apr. 5, 1967, arts. 4-5, Ger. Dem. Rep.-Pol., 6 I.L.M. 514 (1968).

262. Treaty of Dunkirk, *supra* note 63, preamble, arts. 1-2, 9 U.N.T.S. at 188-92, predecessor to the WEU Treaty, *supra* note 224; see also COOK, *supra* note 63, at 33, 75, 114, 116, 122, 259–60; GROSSER, *supra* note 234, at 84–85; *supra* notes 224–31 and accompanying text. Countries of the Western alliance systems concluded agreements too; some seem to contemplate only reactive self-defense obligations, e.g., Alliance Treaty, July 29, 1953, Libya-U.K., arts. 2–3, 186 U.N.T.S. 185, 192 (consultation required for an "imminent menace of hostilities"; also describing basing rights). Nonaligned States negotiated bilateral agreements, e.g., Defense Agreement, May 30, 1967, United Arab Rep.-Jordan, art. 1, 6 I.L.M. 516 (1968) (collective defense against "armed aggression"). See also 2 Grenville, *supra* note 248, at 348, 361.

263. See generally Walker, *Maritime Neutrality*, *supra* note 146, at 131-40.

264. See *supra* notes 1–4 and accompanying text.

265. See *supra* note 1 and accompanying text.

266. See *supra* notes 1–2 and accompanying text.

267. MCCORMACK, *supra* note 1, at 131; Mullerson & Scheffer, *supra* note 1, at 110–11. 2 O'CONNELL, *supra* note 4, at 1101, and O'CONNELL, *supra* note 1, at 3, recognized this; writing over two decades earlier, O'Connell had concluded, however, that navies were coming to a reactive view of self-defense. *Id.* at 83, 171. Perhaps O'Connell's view would be different today; he seems to say as much in 2 O'CONNELL, *supra* at 1101. See also *supra* note 4 and accompanying text.

268. See *supra* notes 201–03, 205–06, 214, 217, 220, 224, 233, 236–38, 248–49 and accompanying text. The principal exception appears to be the now defunct Baghdad Pact, *supra* note 250; see also *supra* notes 250–52.

269. 2 OPPENHEIM, *supra* note 1, § 52aa, at 157.

270. See *supra* notes 109–15, 172–73, 202–10 and accompanying text. To be sure, most States are UN Members today. However, a customary collective self-defense right may be claimed if the Charter does not apply. See generally *Nicaragua Case*, *supra* note 1; *supra* notes 112, 174–76.

271. U.N. CHARTER art. 1(1); see also GOODRICH ET AL., *supra* note 5, at 25–26, citing *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 213–15 (sep. opin. of Fitzmaurice, J.); LOUIS B. SOHN, *BROADENING THE ROLE OF THE UNITED NATIONS IN PREVENTING, MITIGATING OR ENDING INTERNATIONAL OR INTERNAL CONFLICTS THAT THREATEN INTERNATIONAL PEACE AND SECURITY* 5–6 (INT’L R. OF L. CENTER OCCASIONAL PAPERS, 2d Ser., No. 1, 1997) (Charter drafters felt that the United Nations’ “first purpose” was maintaining international peace and security). Reference in Art. 1(1) to maintenance of international peace and security through collective measures has meant collective security through the UN system. GOODRICH ET AL., *supra*, at 51–52; SIMMA, *supra* note 1, at 51–52. A right of collective self-defense is not inconsistent with or subordinate to Art. 1(1)’s declaration that States should seek dispute resolution through collective measures within the UN system, e.g., through Security Council action. U.N. CHARTER art. 51, preserves an “inherent right of . . . collective self-defence” until the Council acts. This is buttressed by the continuing vitality of the principle of national sovereignty, also stated in the Charter. See generally *id.*, art. 2(1); *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 4, 18; U.N. Secretary-General, *An Agenda for Peace: Report of the Secretary-General on the Work of the Organization*, U.N. Doc. A/47/277, S/24111 (1992), reprinted in 31 I.L.M. 956, 959 (1992); MICHAEL AKEKURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 21–23 (Brian Chapman ed., 3d ed. 1977); BRIERLY, *supra* note 173, at 45–49; SCHACHTER, *supra* note 1, at 9–15; Boutros Boutros-Ghali, *Empowering the United Nations*, FOREIGN AFF., Winter 1992, at 89, 98–99; Charney, *supra* note 195, at 530; but see HENKIN, *supra* note 1, at 9–10.

272. SCHACHTER, *supra* note 1, at 401.

273. See *supra* notes 1–2 and accompanying text.

274. See *supra* notes 167–70 and accompanying text.

275. See, e.g., *supra* notes 203, 215, 220, 223–24, 239 and accompanying text.

276. U.N. CHARTER arts. 2(1), 51, 103. See also *supra* notes 112, 176 and accompanying text.

277. See *supra* notes 1–4, 21, 23–30, 32, 78–80, 85, 97–101, 10, 127–32, 143–64, 202–10 and accompanying text.

278. See *supra* note 203 and accompanying text.

279. E.g., ALEXANDROV, *supra* note 1, at 163, appears to support his view that the 1981 Israeli raid on the Iraqi nuclear reactor could not be supported by self-defense because of the 1994 debate on imposing sanctions on North Korea, rather than using force, because of the danger of nuclear weapons. MCCORMACK, *supra* note 1, at 98–99, derides the claim that Israel had been given a necessary guarantee of security under the U.S. “Star Wars” program was a reason why it may not have been necessary for Israel to bomb the reactor.

280. See VON CLAUSEWITZ, *supra* note 111, at 117–21.

281. RESTATEMENT (THIRD), *supra* note 52, § 313 cmt. b analyzes declarations and understandings:

When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation. Sometimes, however, a declaration purports to be an "understanding," an interpretation of the agreement in a particular respect. Such an interpretive declaration is not a reservation if it reflects the accepted view of the agreement. But another . . . party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.

. . . [For] a multilateral agreement, a declaration of understanding may have complex consequences. If it is acceptable to all . . . , they need only acquiesce. If, however, some . . . share or accept the understanding but others do not, there may be a dispute as to what the agreement means, and whether the declaration is in effect a reservation. In the absence of an authoritative means for resolving that dispute, the declaration, even if treated as a reservation, might create an agreement at least between the declaring state and those who agree with that understanding. See [RESTATEMENT (THIRD), *supra*, § 313(2)(c), dealing with reservations] However, some . . . parties may treat it as a reservation and object to it as such, and there will remain a dispute between the two groups as to what the agreement means.

See also ILC Rep., *supra* note 188, at 189–90; Bowett, *Reservations*, *supra* note 124, at 69; *supra* notes 124, 197 and accompanying text for analysis on reservations.

282. Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (Protocol I). Although the United States is likely to ratify Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, *id.* 609, the Reagan administration expressed serious reservations concerning Protocol I, *supra*, and did not seek Senate advice and consent for it. Letter of Transmittal from President Reagan to the U.S. Senate, Jan. 29, 1987; Letter of Submittal from Secretary of State George P. Schultz to President Reagan, Dec. 13, 1986, in Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, S. TREATY DOC. NO. 100–2, 100th Cong., 1st Sess. (1987), *reprinted in* 26 I.L.M. 561 (1987).

283. Convention (I) for Amelioration of Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, *id.* 3217, 75 U.N.T.S. 85; Convention (III) Relative to Treatment of Prisoners of War, Aug. 12, 1949, *id.* 3316, 75 U.N.T.S. 135; Convention (IV) Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, *id.* 3516, 75 U.N.T.S. 287 (Fourth Convention).

284. Protocol I, *supra* note 282, art. 51. Article 51(2) and 51(5) prohibitions on attacks on civilians, absent other considerations, e.g., civilians who take up arms, restate customary law. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICT 299 & n.3 (1982); DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS AFP 110–31, ch. 14 (1976); SAN REMO MANUAL, *supra* note 5, ¶ 39; NWP 1-14, *supra* note 1, § 6.2.3.2. (noting protections also under Fourth Convention, *supra* note 238, art. 33, 6 U.S.T. at 3538, 75 U.N.T.S. at 310), 11.2 n.3, 11.3; NWP 9A, *supra* note 1, ¶¶ 6.2.3.2 (noting protections also under Fourth Convention, *supra* note 283, art. 33,

11.2 n.3, 11.3; 4 JEAN S. PICTET, *THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, at 224–29 (1952); STONE, *LEGAL CONTROLS*, *supra* note 182, at 684–732; Michael J. Matheson, *Remarks, in Session One: The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the Geneva Conventions*, in Symposium, *The Sixth Annual American Red Cross - Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 423, 426 (1987); William G. Schmidt, *The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions*, 24 AIR FORCE L. REV. 189, 225–32 (1984); Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT'L L. & POL'Y 117, 130–31. Civilians may not be used as human shields, nor may they be a subject of attacks intended to terrorize them, although otherwise legitimate attacks that happen to terrorize them are permissible. Specific intent to terrorize gives rise to liability. NWP 9A, *supra*, ¶ 11.2 (noting protections under Fourth Convention, *supra*, arts. 28, 33, 11.3; Hans-Peter Gasser, *Prohibition of Terrorist Attacks in International Humanitarian Law*, 1985 INT'L REV. RED CROSS 200; Commission of Jurists to Consider and Report Upon Revision of Rules of Air Warfare, *Hague Rules for Aerial Warfare*, art. 22, reprinted in Ronzitti, *supra* note 138, at 385; Matheson, *supra* at 426; Schmidt, *supra* at 227. Rules of distinction, necessity and proportionality, with concomitant risk of collateral damage inherent in any attack that are stated in Article 51 generally restate custom. BOTHE ET AL., *supra* at 309–11, 359–67; FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 99–100 (1987); MCDUGAL & FELICIANO, *supra* note 1, at 525; NWP 9A, *supra*, ¶¶ 5.2 & n.6, 8.1.2.1; SAN REMO MANUAL, *supra*, ¶¶ 39–42 & Commentaries; STONE, *supra* at 352–53; W.J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 125 (1982) (questioning whether proportionality is an accepted customary norm); Matheson, *supra* at 426; *Results of the First Meeting of the Madrid Plan of Action Held in Bochum, F.R.G., November 1989*, 7 BOCHUMER SCHRIFTEN ZUR FRIEDENSSICHERUNG UND ZUM HUMANITAREN VOLKERRECHT 170–71 (1991); Schmidt, *supra* at 233–38; Solf, *supra* at 131; G.J.F. van Hegelsom, *Methods and Means of Combat in Naval Warfare*, in 8 BOCHUMER SCHRIFTEN ZUR FRIEDENSSICHERUNG UND ZUM HUMANITAREN VOLKERRECHT 1, 18–19 (1992).

285. Protocol I, *supra* note 282, art. 52. Article 52 states a general customary norm, except for its prohibition on reprisals against civilians in art. 52(1), for which there is a division of view. See generally BOTHE ET AL., *supra* note 284, at 320–27; COLOMBOS, *supra* note 138, §§ 510–11, 524–25, 528–29; NWP 1–14, *supra* note 1, § 6.2.3. & n.36, 6.2.3.2 (protections for some civilians from reprisals under the Fourth Convention, *supra* note 283, art. 33, 6 U.S.T. at 3538, 75 U.N.T.S. at 308–10), 8.1.1 & n.9 8.1.2 & n.12 (U.S. position that Protocol I, *supra* art. 52(1), 1125 U.N.T.S. at 27, “creates new law”); NWP 9A, *supra* note 1, ¶¶ 6.2.3 & n. 33, 6.2.3.2 (noting protections for some civilians from reprisals under Fourth Convention, *supra* note 283, art. 33, 8.1.1 & n.9, 8.1.2 & n.12 (noting US position that Protocol I, *supra*, art. 52[1], “creates new law”); 2 O'CONNELL, *supra* note 4, at 1105–06; 4 PICTET, *supra* note 284, at 131; CLAUD PILLOUD, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, ¶¶ 1994–2038 (Yves Sandoz et al. eds., 1987); Matheson, *supra* note 284, at 426; Solf, *supra* note 284, at 131. Frank Russo, Jr., *Targeting Theory in the Law of Naval Warfare*, 30 NAVAL L. REV. 1, 17 n. 36 (1992) rejects applying Protocol I, *supra*, art. 52(2), to naval warfare.

286. Protocol I, *supra* note 282, art. 57. Rules of distinction, necessity and proportionality, with the concomitant risk of collateral damage inherent in any attack, in Article 57, are generally restatements of customary norms. See generally BOTHE ET AL., *supra* note 284, at

309–11; KALSHOVEN, *supra* note 284, at 99–100; MCDUGAL & FELICIANO, *supra* note 1, at 525; SAN REMO MANUAL, *supra* note 5, ¶¶ 39–42 & Commentaries; STONE, LEGAL CONTROLS, *supra* note 168, at 352–53; Fenrick, *The Rule*, *supra* note 284, at 125 (questioning whether proportionality is accepted as a customary norm); Matheson, *supra* note 284, at 426; Results, *supra* note 262, at 170–71; Schmidt, *supra* note 284, at 233–38; Solf, *supra* note 284, at 131; van Hegelsom, *supra* note 284, at 18–19.

287. Declaration of Belgium, May 20, 1986, reprinted in SCHINDLER & TOMAN, *supra* note 207, at 706, 707; Declaration of Italy, Feb. 27, 1986, reprinted in *id.* 712; Declaration of the Netherlands, June 26, 1977, reprinted in *id.* 713, 714; Declaration of the United Kingdom, Dec. 12, 1977, reprinted in *id.* 717.

288. Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 19 I.L.M. 1523 (Conventional Weapons Convention).

289. Conventional Weapons Convention, *supra* note 288, Protocol on Prohibitions or Restrictions on Use of Mines, Booby Traps and Other Devices (Protocol II), Oct. 10, 1980, art. 2(4), 1342 U.N.T.S. 168, as amended, May 3, 1996, art. 2(6), 35 I.L.M. 1206, 1209 (1996) (Amended Protocol II); Protocol on Prohibitions or Restrictions on Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, art. 1(3), 1342 U.N.T.S. 171, 172. The United States has ratified the Convention and Protocols I and II *supra*; Protocol III is not in force for the United States. TIF, *supra* note 113, at 454. However, Amended Protocol II, Protocol III and Protocol IV on Blinding Laser Weapons, May 3, 1995, 35 I.L.M. 1218 (1996) are now before the U.S. Senate. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 325 (1997). Protocol IV and Protocol on Non-Detectable Fragments (Protocol I), Oct. 10, 1980, 1342 U.N.T.S. 168, do not have these provisions. Protocol II and III commentators say little about these provisions; they state the obvious. See Burrus M. Carnahan, *The Law of Land Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73 (1984); W.J. Fenrick, Comment, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, 19 CAN. Y.B. INT'L L. 229 (1981); Howard S. Levie, *Prohibitions and Restrictions on the Use of Conventional Weapons*, 68 ST. JOHN'S REV. 643 (1994); J. Ashley Roach, *Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?* 105 MIL. L. REV. 1 (1984); William G. Schmidt, *The Conventional Weapons Convention: Implications for the American Soldier*, 24 A.F.L. REV. 279 (1984). The United States declared it would not sign Convention on Prohibition of Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997). See generally President William J. Clinton, *Remarks on Landmines and an Exchange with Reporters*, 33 WEEKLY COMP. PRES. DOC. 1356–59 (Sept. 22, 1997). Action by other states indicates that the Convention will be in force soon.

290. *Recent Actions Regarding Treaties to Which the United States Is Not a Party*, 35 I.L.M. 1339 (1996) lists 145 States party to Protocol I, *supra* note 282. The United States is not a party; see *supra* note 282. TIF, *supra* note 113, at 454, listed 63 States for Conventional Weapons Convention, *supra* note 288. Most are parties to Protocols II and III, *supra* note 289.

291. SAN REMO MANUAL, *supra* note 5, ¶ 46(b) & Commentary 46.3; see also BEN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 90 (1983); DINSTEIN, *supra* note 1, at 191; MCDUGAL & FELICIANO, *supra* note 1, at 220.

292. See *supra* notes 17, 33–35 and accompanying text.

293. See *supra* notes 37–69 and accompanying text.

294. See *supra* notes 87–164, 183, 208, 213, and accompanying text.

295. See *supra* notes 167–215 and accompanying text.

296. See *supra* note 23 and accompanying text.

297. See *supra* notes 216–77 and accompanying text.

298. Cf. Lowe, *supra* note 1, at 128.

299. U.N. CHARTER arts. 25, 48; see also SYDNEY D. BAILEY, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 235–46 (2d ed. 1988); JORGE CASTENEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* 71–75 (1969); GOODRICH ET AL., *supra* note 5, at 207–11, 334; SIMMA, *supra* note 1, at 410–15, 652; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 87 (1993).

300. See *supra* notes 278–91 and accompanying text.

301. See *supra* notes 253–55 and accompanying text.

302. See *supra* notes 244–47 and accompanying text.

303. See *supra* notes 218–23 and accompanying text.

304. See *supra* notes 232–34 and accompanying text.

305. E.g., in the case of the United States, its arrangement with Taiwan was ended by denunciation. The United States has withdrawn from the Philippines. The trilateral ANZUS Pact, *supra* note 183, has been suspended with respect to New Zealand. U.S. bilateral treaties with Japan and South Korea remain in full force, however. See *supra* notes 240–43, 256–60 and accompanying text.

306. Compare, e.g., Raymond Ausmus et al., *Building a New NATO*, FOREIGN AFF., Sept.-Oct. 1993, at 28, and Colin L. Powell, *U.S. Forces: Challenges Ahead*, *id.*, Winter 1992, at 32, 42, with Owen Harries, *The Collapse of "The West," id.*, Sept.-Oct. 1993, at 41; see also MANDELBAUM, *supra* note 20; Albright, *supra* note 82; Perlmutter & Carpenter, *supra* note 82.

307. E.g., the European Union, successor to the European Economic Community, has indicated a security role may be part of its agenda. See *supra* notes 229–30 and accompanying text; see also, e.g., *supra* note 183 and accompanying text.

308. See Kahgan, *supra* note 176; see also *supra* note 176 and accompanying text.

XVI

Permanent Concerns, Legal Norms, and The Changing International Order

Robert S. Wood

FORMALLY OR INFORMALLY, four key sets of questions shape the manner in which those in the national security policy arena evaluate an issue fraught with legal implications: (1) what is the settled policy of the United States; (2) what specific interests are at stake, and what are the objective outcomes we seek; (3) what are the requirements of the contemporary international legal regime, and what concrete obligations has the United States undertaken; and (4) what is the nature and direction of the international system or environment. It is through the evaluation of the dynamic interaction of these factors that one determines the course of action. Law is no simple application of norm to situation, but a rigorous interpretation of both.

The key variable in future years will be the changing nature of the international system, including not only the general configuration of power but the technology of conflict. Policy makers and pundits alike are seeking both to define and to influence the characteristics of that environment within which the legal regime will evolve and which will in turn be shaped by the law.

It is worth noting in the first place that the United States is entering into “normal” times. The United States emerged as a great power in the late nineteenth century at the very moment when the relatively stable balances of the preceding period were giving way to titanic struggles over the mastery of Europe and Asia. America was about to be swept up in the vortex of universal history.

However brutal yet tawdry the drama would be, the twentieth century would be no *opera comique* or afternoon “soap.” Many of the actors would be heroic and even the petty villains endowed with a wickedness to inspire a Dante or a Milton. The issues would be primordial and the stakes mortal. It would be a polarizing century. How fatuous it would be to ask in 1918, 1940, 1960, or 1980, though some, alas, in fact did, who the enemy was or what the contest was all about.

Now, after the heroic struggles of the twentieth century, the United States is seeking to understand and to play its role as a great power without a great quarrel. And we may discover that it is not peace that is enervating for military forces; it is a diffusion of the threats, uncertainty of the stakes, and ambiguity in the response. Such an era has dangers ultimately as deadly as the protean struggle of the giants, for the lines we must defend are not clearly marked and the perilous consequences of error and weakness less immediately apparent.

Even the polarizing clashes of the twentieth century had moments of deceleration and of lassitude. Winston Churchill, writing of the aftermath of World War I, observed:

To the faithful, toil-burdened masses the victory was so complete that no further effort seemed required. Germany had fallen and with her the world combination that had crushed her. Authority was dispersed; the world unshackled; the weak became the strong; the sheltered became the aggressive; the contrast between victors and vanquished tended continually to diminish. A vast fatigue dominated collective action. Though every subversive element endeavored to assert itself, revolutionary rage like every other form of psychic energy burnt low. Through all its five acts the drama had run its course; the light of history is switched off, the world stage dims, the actors shrivel, the chorus sinks. The war of the giants has ended; the quarrels of the pygmies have begun.¹

That same Winston Churchill believed that the devastation of the Second World War stemmed from the inability of the great democracies in the aftermath of that first Great War to manage the quarrels of the pygmies and the demands of the ordinary. As he again wrote, this time in the commencement of his study of World War II:

It is my purpose . . . to show how easily the tragedy of the Second World War could have been prevented; how the malice of the wicked was reinforced by the weakness of the virtuous; how the structure and habits of democratic states, unless they are wielded into larger organisms, lack those elements of persistence and conviction which can alone give security to humble masses; how, even in matters of self preservation, no policy is pursued for even ten or fifteen years at a time. We shall see how the counsels of prudence and restraint may become the prime agents of mortal danger; how the middle course adopted from desires for safety and a quiet life may be found to lead directly to the bull's-eye of disaster. We shall see how absolute is the need of a broad path of international action pursued by many states in common across the years irrespective of the ebb and flow of national politics.²

What, then, are the requisites of a great power in ordinary times? What do the people need from those who will stand guard over the animating values and concrete interests of the nation?

First, true leadership must retain a sense of those permanent values and interests that define and animate this remarkable democratic republic. And second, it must grasp, if only intuitively and "through a glass darkly," the changes that are moving us beyond the contours of international power in the twentieth century into the configuration of power and influence and the focus of competition and cooperation in the twenty-first century. "The future," as Yogi Berra observed, "isn't what it used to be."

Throughout the course of this century, two great systemic gulfs have opened. First, a disjuncture between social and political boundaries, and second, a chasm between the aspirations of our peoples and the competence of our governments. The two are probably related. This disjuncture between social and political boundaries is described in many ways—globalization of the economy, clash of civilizations, tribalization, global environmentalism, information revolutions, the universal reach of weapons, persistent mass migrations, and so forth. In effect, many important social activities transcend traditional territorial boundaries. This in itself is not bad and in many areas is a positive good. The difficulty stems from the fact that not only are many of these activities unregulated by political norms and legal understandings, but they are connected with no particular community and hence animated by no sense of the common good. This disconnect is particularly troublesome to the various governments around the world, because their peoples do hold those individual regimes responsible for the general welfare, the elements of which they sometimes have only tenuous control. In addition to all the historical

possibilities open to demagoguery, ambition, and avarice, these disjunctures provide even more opportunity for mischief.

Hence, the great issue of the early twenty-first century is likely to be that of political organization: how power and authority will be shared within, between, and across states and how individual liberty and collective action will be reconciled; what mechanisms will be developed on how and to what degree the growth in the general storehouse of wealth will be distributed; what norms will legitimize the exercise of power within and without; and what constraints will be expected and enforced.

A moral vision and a political and economic formula will be critical to the architecture of the new century, but without a foundation of security, the house will not withstand the inevitable vicissitudes of economic downturn, political ineptitude, and personal ambition. There will be at least three key ingredients of that foundation which will affect how we think about general norms of international law and the laws of armed conflict. They are:

First, a solid structure of deterrence and reassurance: to protect the sinews, even in the new era, of our political independence and territorial integrity and to guard against the undue concentration of international power;

Second, a modicum of international public order: to establish or renew limited but real norms of international behavior and to be prepared, as circumstance dictates and allows, to enforce those norms through independent and collective coercive action; and

Third, a residual capacity to apply military organization to relieve, where appropriate, human suffering.

What are the implications for international law in general and military operational law in particular of this new world and the required security system? Such a question raises both the possibilities and the limitations of any legal code. Law reflects social values and interests and provides predictable norms in terms of which both group and individual decisions are made. In simple terms, law, to be effective or legitimate, must embody a shared concept of justice and a promise of public order, that is, the minimization of arbitrariness reflected in widespread violence and random social behavior.

Every legal system constitutes rules *for* human behavior, not physical or biological rules of human behavior. Hence, even if reflective of the interests and values of the community, there is always a gap between the legal norm and social behavior. The issue for the legitimacy and continuity of the legal system is whether or not the gap is so great as to constitute a scandal, an irrelevance, a danger, or all of the above.

A central issue in any political-legal order is why one should obey at all. Typically the answer is three-fold:

First, the appeal to conscience. This raises such concerns as, is the regime “good,” is the social arrangement “proper,” and does the political order sustain the “good life”?

Second, calculations of interest. Important here is the balance between the immediate possession of “goods” (short term), on the one hand, and on the other hand, the continuous protection of or access to those goods by virtue of the social arrangements (long term).

Third, coercion. This involves not simply brute strength but the ability of a political regime to invoke obligations arising from a coordinated perspective of what constitutes collective values, goods, actions and a willingness on the part of the subjects of that regime to entrust to it the authority and the power to reconcile divergent claims and enforce compliance.

Politics is hence not simply consensus but implies enforcement of communal norms, i.e., coercion. Cicero described the political order as an agreement in justice. This specifically entails the joining of rights to duties within the framework of an agreed vision of the common good. Many social communities are primarily voluntary in character with little or no coercive core, and some have argued that the broader political community may be likewise. Indeed, this latter view is the basis of social utopian schemes, and undergirded Marx’s notion of the withering away of the State, ironical in view of the Soviet totalitarian experience. Nonetheless, the key problem of what Aristotle would have called a constitutional regime is to define the relationship between consent and coercion.

The coercive aspect of politics has three basic elements:

- a. The legitimization of coercion—the political order is necessarily a moral order. It was by design that Aristotle’s study of ethics and of politics were considered of a piece;
- b. The complex organization of coercion; and
- c. The regularization and limitation of coercion, i.e., lawful force.

In the most stable political communities, persistent coercion is not normal and tends to be distant in the life of the ordinary citizen. This may be true of both domestic and of international politics; for instance, on the domestic side, Sweden, the Netherlands and Switzerland, and, on the international side, U.S.-Canadian relations or the European Union.

The “scandal” of the international political-legal system has, of course, always been endemic violence, even to the point of jeopardizing the very integrity or independence, sometimes existence, of the member States. As has

been often noted, this state of affairs stems in the first instance from the anarchic character of international affairs: there is no universally accepted or effective keeper of the "*ultima ratio*," the exclusive right of enforcement. Exacerbating this structural problem is the heterogeneity of political systems, with its differing conceptions of law, and the periodic disruptions associated with messianic or imperial visions.

Recall the two systemic disjunctures mentioned earlier—the increasing gap between social and political boundaries and the concomitant distance between the aspirations of the citizenry and the ability of government to meet those aspirations. In addition to the normal tensions which anarchy, ambition, and political heterogeneity introduce to the international legal regime, the denationalization and globalization of many economies and the increasing social tribalization within and across national boundaries have further complicated all the key elements of both domestic and international law enforcement.

In a sense we are building a "new international order" while seeking to cope with the old international order! We hear talk about the demise of the nation state and the declining utility of force whilst such states seem quite lively and prone, along with "non-state" actors, to use force on a regular basis. The contradictions may only be apparent. As noted above, there is always a gap between legal norm and social behavior. So too, human beings are always creating new forms of activity that transcend current legal institutions and political authority. In time, such activity has such impact on other individuals and groups that improvements in political and legal institutional competencies or new forms of cooperation and control are sought. States, alliances and coalitions, international organizations are not dying but being recast. In the security realm this has certain immediate implications.

One often hears American public officials, military officers, and political-military commentators speak of the importance of "stability" as an object of U.S. security policy. Assuming this is not simply a code word for the status quo and no change, it probably refers to a degree of security and satisfaction as well as the availability of means of peaceful change among peoples that is sufficient to minimize violence and reinforce a political order widely accepted as legitimate. In effect, even as we seek to realize our immediate interests, we need to do so in such a way as to reinforce existing standards or to develop new norms of international behavior and to employ our power unilaterally or in association with other states to "incentivize" adherence to such norms.

Earlier, three key elements of a security foundation were mentioned—a structure of deterrence and reassurance, a modicum of public order, and a capacity to alleviate human suffering. In concrete terms, these broad objectives translate in the first instance into political associations that join in predictable ways U.S. diplomatic, economic, and military power with that of a number of great powers. In this regard, some of the key diplomatic, economic, and military cooperative mechanisms developed after World War II are still relevant—such as NATO, the World Bank, the IMF, the American-Japanese alignment, the UN, and more recent innovations such as the World Trade Organization, the North American Free Trade Association, new connections being forged with Russia and China and others. If deterrence and reassurance are to be structural, they must be anchored in normative understandings and articulated in institutional mechanisms. In effect, structural deterrence is grounded in collective legitimization. It cannot be sustained by American power alone, though U.S. military predominance and economic preeminence are probably key preconditions, nor can it endure by unilateral or *ad hoc* responses.

If multilateralism is a key element of a deterrence and reassurance structure, it is equally so of the “routine” business of maintaining international public order. The control of transnational flows, many incident to globalization and driven by information and transportation technology, may require an unprecedented coordination of international efforts. Whether it be population movements, illegal commerce, or financial transactions, the development of rules, institutions, and cooperative procedures will become increasingly urgent. Constraints on the development, manufacture, and use of weapons of mass destruction will require a higher degree of consensus—both on the nature of the constraints and the means to enforce them—than currently exist. Witness the fragmented approach to Iraq. The same holds true for the general issue of terrorism. The definition and maintenance of international boundaries—whether they be territorial, diplomatic, economic, or military—will be at the heart of the agenda of re-articulating political organization in the twenty-first century.

Humanitarian assistance has become an important, if still inchoate, commitment of the member States of the United Nations. When such aid requires the commitment of coercive force, the line between humanitarian and political intervention becomes very fine indeed. It is difficult here too to see how such activity can be long sustained without a multilateral framework and collective legitimization.

In a real sense the international legal principles associated with the 1648 Treaty of Westphalia—political independence, territorial integrity, legal

sovereignty, and domestic jurisdiction—were a response to the emergence of independent states and provided the foundation for the international public order even to the present. Interdependence was not in 1648 nor in 1998 contradictory to these principles. Indeed, it was the fact that the emerging states of Europe were interdependent, often in a deadly way that impelled the princes of Europe to define guidelines for that interdependence. The issue of the emergent international order is not the interdependence of states but the globalization of economies and the transnational character of social movements. And, to a substantial degree, this transnational interlinkage is the end product of a particular political-economic philosophy, liberal economics, and the policy of an identifiable power, the United States.

The persistent, if not always consistent, exercise of American power since World War II for international economic liberalization provided the essential matrix for the substantial denationalization of the advanced industrial economies and the remarkably free movement of peoples, goods, services, and capital across national boundaries. The permeability of state frontiers has been hastened by the nuclear, information, communication, and transportation revolutions. But none of these technological innovations would have been sufficient to transform the state system as thoroughly as has the political model of liberal economics. Neither Adam Smith nor John Locke would have been surprised.

The essence of this model as embraced by the United States is the concept that state power should be so delimited as to allow a wide sphere for private choice and activities, including across national boundaries. At the same time, in theory and practice, the United States rejected the Bodinian concept that sovereignty cannot be divided but instead acted as if sovereignty could be dispersed and functionally-based. Coupled with the notions of natural, individual rights and of obligations transcendent of particular group (e.g., racial, ethnic, familial, religious, etc.) identifications—in effect, human rights and the rule of law—this philosophy of limited government and divided sovereignty became a powerful tool in the shaping of world politics. What is remarkable is that at almost any point from the end of the nineteenth century until very recently, one could as well have projected a wholly different vision—one of statism, nationalism, and autarky. As we approach the next century, however, it is clear that the liberal model reinforced by critical technological changes has decisively altered key elements of the international system. Social tribalization could ultimately trump this global society and reintroduce once again new forms of nationalism and statism, but it is not clear why the United States would favor such a return.

The implications of this line of reasoning should be clear: U.S. policy should be aimed at developing and sustaining universal norms that maintain open societies. This requires not only the removal of barriers to private social transactions, including commerce, across national boundaries but the creation and enforcement of rules for those activities that meet the expectations of our publics for justice and equity. This will require not only that many of the classical norms of the Westphalian order pertaining to the threat and use of force be upheld, but that norms relevant to a globalized system be defined and strengthened. This points to rules governing international commerce and what can only be seen as constabulary functions. The latter includes peace operations and arms control.

To be precise on the last point, whether it be a policy related to the proliferation of weapons of mass destruction or to the restoration of order in Haiti or the enforcement of the Dayton Accords in Bosnia, all entail an intervention into areas which used to be seen as falling within the sovereign jurisdiction of states. Unilateralism in these areas can only be seen as violations both of older concepts of international law and destructive of the development of norms adequate for societies that are increasingly interpenetrable.

To put a finer point on it, there are growing expectations concerning not only the external but as well the internal behavior of states and their citizens. Certain standards of government behavior vis-à-vis one's own citizens, presumed obligations concerning the development and manufacture of specified weapons systems, commerce in various items such as narcotics, decisions on trading partners, genocidal activities involving not only governments but parties to an internal conflict, the degree and character of public order, and comparable issues are increasingly being presented as raising questions of international law. And collective and individual state actions are being taken under this guise. The issue, in effect, is intervention within areas that historically have been thought as subject to domestic jurisdiction. Without a fairly specific set of agreed international rules in these areas and acceptable mechanisms to enforce them, there is a grave danger that states, and perhaps even non-state groups, will seek to legitimize unilateral intervention in behalf of parochial state interests by reference to presumed international standards. Ancient ambitions and modern globalization of our societies invite this abuse. Both the older order of Westphalia and the newer order generated by economic liberalization and contemporary technologies will fall victim—with consequent cascading disorder.

While unilateral capabilities and actions will remain a key element in a still fragmented international system, and while such capabilities are probably

crucial for the United States to play the role of coalition builder and, yes, global constable, it is important that those capabilities be employed in such a way as to be norm-creating or reinforcing, that is, to yield an international system that is held in balance less by brute force and narrow calculations of interest than by, again harking back to Cicero, an agreement in justice. Both the nature of U.S. interests and the costs of unilateralism dictate that American power be oriented not only toward specific goods but toward the creation of a political and legal regime that will command the assent of a large number of the great and lesser powers. In effect, U.S. policy makers must exhibit a persistent and sophisticated understanding of the process of collective legitimization.

In all this there is no area where all the elements of the security foundation will come together more clearly than in operational law, which crystallizes theory into practice in the development and application of rules of engagement (ROE). The *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations* defines ROE thusly: "During wartime or other periods of armed conflict, U.S. rules of engagement reaffirm the right and responsibility of the operational commander generally to seek out, engage, and destroy enemy forces consistent with national objectives, strategy, and the law of armed conflict." It further speaks of Standing Rules of Engagement approved by the National Command Authorities that delineate "the circumstances under which U.S. forces will initiate and/or continue engagement with other forces encountered."

In a critical way, practice appears to be expanding this narrow definition of ROE to cover all sorts of activities, including those not normally associated with "periods of armed conflict," such as humanitarian intervention, and to be aimed not only at the control of U.S. forces but coalitional forces as well. The scope of peacetime rules of engagement and the practical meaning of the Standing Rules of Engagement are being progressively expanded. These norms have provided the foundation not only for instruction to American officers but to foreign officers around the world.

In a recent international simulation sponsored in Europe by the Naval War College, it became evident to the members of that distinguished foreign audience that abstract commitment to cooperate never has the clarity to affect events unless tied to rules by which armed forces would join and collaborate. Scholars of international politics and law will explicate the changing requirements of international security, and statesmen will forge general agreements. It is in the area of operational law, however, that the true dimensions of these requirements and agreements will be revealed.

Jean Girandoux, in a statement not meant to be complimentary, once wrote that international law is “the most powerful training ground for the imagination.” And in a real sense it is and should be. If vast social forces are transforming the international system, and if, as I have contended, the great issue of the twenty-first century will be that of political organization, both of states and the community of states, then we are in a period in which the legal imagination must be pressed into service. This will require a re-articulation of the general principles of international law and the extension of the scope and depth of operational law in the national security arena. Such an evolution is critical not only for a relatively stable international order but is likely to be fundamental to the role of the United States as a great regulatory and constitutive power. Both the short-term and long-term interests of the Republic are bound to the political imagination and will of those American leaders entrusted with the defense of those interests in a time when, in the words of Alfred Lord Tennyson, “the old order passeth away. The new is struggling to be born.”

Notes

1. WINSTON S. CHURCHILL, *THE AFTERMATH* (vol. 4, *THE WORLD CRISIS 1918–1928*) 17 (1929).
2. WINSTON S. CHURCHILL, *THE GATHERING STORM* (vol. 1, *THE SECOND WORLD WAR*) 17–18 (1948).

Contributors

Captain M. E. Bowman, JAGC, U.S. Navy (Ret.), is the Associate General Counsel for National Security Affairs at the Federal Bureau of Investigation. Prior to his current appointment, Captain Bowman served in the U. S. Navy for 26 years as a line officer, intelligence officer and judge advocate. His assignments included tours at the National Security Agency, where he was responsible for litigation involving classified information and restructuring the Agency's Freedom of Information and Privacy Act programs; Force Judge Advocate for Naval Logistics Command; Head of International Law at the Naval War College; and Officer-in-Charge, United States Sending Office for Italy, EUCOM legal representative for Italy, and legal advisor to the Ambassador.

Vice Admiral James H. Doyle, Jr., U.S. Navy (Ret.), completed thirty-four years of service including assignments as Deputy Chief of Naval Operations, Surface Warfare; Commander Third Fleet, Commander Cruiser-Destroyer Group Twelve and Attack Carrier Striking Group Two; Chief, International Negotiations Division, Joint Staff; member of the Law of the Sea delegation; and Commanding Officer of four surface ships, including the first nuclear-powered destroyer, USS *Bainbridge*. He is a graduate of the National Law Center, George Washington University, where he taught International Law of the Sea from 1982–89. Vice Admiral Doyle was among the group of international lawyers and naval experts that produced the *SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA*. He is a member of the Naval War College Advisory Board on Operational Law and is Vice Chairman of the Strike, Land Attack and Air Defense Committee of the National Defense Industrial Association.

Professor Leslie C. Green is the Charles H. Stockton Professor of International Law at the Naval War College. After serving in the British Army during World War II, he held university appointments at the University of London; University of Singapore; University of Alberta, where he is University Professor Emeritus; Kyung Hee University, Seoul, Korea; University of Colorado; and University of Denver. Professor Green's many government appointments include Member and Legal Advisor to the Canadian delegation to the Geneva Conference on Humanitarian Law in Armed Conflict (1975–77) and special consultant to the Judge Advocate

General, National Defence Headquarters. In the latter capacity, he wrote the Canadian Manual on Armed Conflict Law. Professor Green is the author of numerous books, including *THE CONTEMPORARY LAW OF ARMED CONFLICT*, and over 320 papers and articles.

Colonel Phillip A. Johnson, U.S. Air Force, is a judge advocate currently serving as an Associate Deputy General Counsel in the International Affairs Division of the Office of the General Counsel, Department of Defense. Previous duties have included service in Vietnam and Germany, a faculty appointment at the U.S. Air Force Academy, two staff judge advocate assignments, a tour as an appellate judge on the Air Force Court of Criminal Appeals, and service as Chief of the International and Operations Law Division, Office of the Judge Advocate General. Colonel Johnson has been a member of the Advisory Board of the Oceans Law and Policy Department of the Naval War College since 1994.

Professor Howard S. Levie retired as a Colonel, Judge Advocate General's Corps, U.S. Army, in 1963. Thereafter, he became a Professor of Law at Saint Louis University until 1977 when he assumed emeritus status. His military assignments include Chief, International Affairs Division, Office of the Judge Advocate General, and Legal Advisor, U.S. European Command. While serving with the Army, he was a principal draftsman of the Korean Armistice Agreement. Professor Levie is the author and editor of many books, including *THE CODE OF INTERNATIONAL ARMED CONFLICT AND PROTECTION OF WAR VICTIMS*. He has also authored many articles and book reviews. During 1971–72, he served as the Charles H. Stockton Professor of International Law at the Naval War College, where he has also served as an Adjunct Professor of International Law since 1991. The College's Howard S. Levie Military Chair of Operational Law at the Naval War College is named in his honor.

Captain Dennis Mandsager, JAGC, U.S. Navy, is the first Commanding Officer of Trial Service Office (TSO) East, which provides command legal advice and prosecution and reporting services to Navy and Marine Corps commands in a twenty-four-State area. Prior to his selection for the Navy's Law Education program, he served on two destroyer escorts. Assignments as a judge advocate have included Fleet Judge Advocate, Seventh Fleet; Director, Navy JAG International Law Division and Deputy DoD/JCS Representative for Ocean Policy Affairs; Legal and Oceans Policy Advisor, Office of the Deputy CNO (Plans, Policy, and Operations); Fleet Judge Advocate, U.S. Pacific Fleet; and Staff Judge Advocate, U.S. Pacific Command.

Professor Myron H. Nordquist is Professor of Law at the U.S. Air Force Academy. After service in the U.S. Marine Corps, Professor Nordquist worked as an attorney and legislative counsel in the Department of State, had a private law practice, and then became the Deputy General Counsel of the Air Force, acting as the General Counsel for six months in 1993. He served as the Charles H. Stockton Professor of

International Law at the Naval War College during the 1995–96 academic year. Among his many publications is *What Color Helmet? Reforming Security Council Peacekeeping Mandates*, issued in 1997 as a Newport Paper by the Naval War College.

Captain Gary Palmer, U.S. Coast Guard, is the Chief, Law Section, Humanities Department, U.S. Coast Guard Academy. His previous afloat assignments include service as a deck watch officer on USCGC *Dependable*; Commanding Officer, USCGC *Point Lobos*; Executive Officer, USCGC *Vigorous*; and Commanding Officer, USCGC *Dependable*, where he conducted extensive alien migrant interdiction operations off the coasts of Haiti and Cuba. He has served as a law specialist in the Seventh Coast Guard District legal office, as District Legal Officer and Staff Judge Advocate to the Seventeenth Coast Guard District Commander in Juneau, Alaska, and as instructor at the Naval Justice School.

Captain J. Ashley Roach, JAGC, U.S. Navy (Ret.), is an attorney in the Office of the Legal Advisor (Oceans, International Environmental and Scientific Affairs), U.S. Department of State. Before retiring from the Navy after twenty-eight years of service, he served on the faculty of the Naval War College from 1975–77 and 1986–88. Captain Roach authored the first edition of the ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, and co-authored EXCESSIVE MARITIME CLAIMS, Volume 66 of the Naval War College's "Blue Book" series. The latter work is in its second edition as, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS. He has also published numerous articles in professional journals on the law of the sea, law of armed conflict, and rules of engagement. Captain Roach was among a group of international lawyers and naval experts that produced the SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA.

Rear Admiral Horace B. Robertson, Jr., JAGC, U.S. Navy (Ret.), served thirty-one years on active duty with the U.S. Navy, first as a general line officer (surface warfare) and later as a judge advocate. Included among his assignments were tours as commanding officer of an amphibious landing ship, Special Counsel to the Secretary of the Navy, Special Counsel to the Chief of Naval Operations, and Judge Advocate General of the Navy. Following his military retirement, Admiral Robertson was appointed Professor of Law at Duke University School of Law, where he assumed emeritus status in 1990. He is the editor of THE LAW OF NAVAL OPERATIONS, Volume 64 of the Naval War College's "Blue Book series. During 1991–92, he served as the Charles H. Stockton Professor of International Law at the Naval War College. Admiral Robertson was among a group of international lawyers and naval experts that produced the SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA. He currently serves as a member of the Naval War College Advisory Committee on Operational Law.

Captain Stephen A. Rose, JAGC, U.S. Navy, has been a member of the Judge Advocate General's Corps for 28 years and currently serves as the Staff Judge Advocate for the U.S. Atlantic Command. Previous assignments include Staff Judge Advocate, U.S. Atlantic Fleet; Deputy Director for Policy Planning, Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict; Commanding Officer, Naval Legal Service Office Guam; and Academic Director, Naval Justice School. In 1989, he studied with Professor Grunawalt at the Naval War College, graduated with highest distinction, and won the Joint Chiefs of Staff writing prize for the best essay on a strategic issue.

Lieutenant Colonel Michael N. Schmitt, U.S. Air Force, is Professor of Law and Deputy Department Head, Department of Law, United States Air Force Academy. Before assuming this position, he served as Professor of International Law and Assistant Director for Air and Space Operations in the Naval War College's Oceans Law and Policy Department. During 1997–98, he was a Visiting Scholar at Yale Law School. Previous operational law assignments include tours as Staff Judge Advocate for the Operations PROVIDE COMFORT (air component) and NORTHERN WATCH. Colonel Schmitt is co-editor of *LEVIE ON THE LAW OF WAR* and *THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM* and has authored numerous articles on international law and military operations.

Colonel James P. Terry, U.S. Marine Corps (Ret.), is an appellate judge on the Board of Land Appeals in Washington, D.C. Prior to his current appointment, Colonel Terry served as an officer in the U.S. Marine Corps for twenty-seven years. His tours as an infantry officer included service as a platoon commander in Vietnam. As a judge advocate, his assignments included service as a Military Judge, Division Staff Judge Advocate, and Marine Expeditionary Force Staff Judge Advocate. Immediately prior to his retirement, he served as Legal Counsel to the Chairman, Joint Chiefs of Staff. Colonel Terry is widely published in the areas of international law, coercion control, and protection of the environment during armed conflict.

Captain Ralph Thomas, JAGC, U.S. Navy, is the Deputy Director, Oceans Law and Policy Department, within the Naval War College's Center for Naval Warfare Studies. During his twenty-eight years of service, his assignments have included Commanding Officer, Naval Legal Service Office, Pearl Harbor; Executive Officer, Naval Justice School; and Staff Judge Advocate, U.S. Naval Forces, Philippines. He has also served in the International Law Division of Navy JAG, the Office of the Legal and Oceans Policy Advisor, Office of the Deputy Chief of Naval Operations (Plans, Policy, and Operations), and the Office of the Staff Judge Advocate, U.S. Pacific Command. Captain Thomas is a Naval War College graduate with highest distinction.

Professor Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for

National Security Law, where he serves as Associate Director. A former three-term chairman of the ABA Standing Committee on Law and National Security, and since 1992 Editor of the ABA *National Security Law Report*, he previously served as a Principal Deputy Assistant Secretary of State and as the first President of the congressionally-established U.S. Institute of Peace in Washington, D.C. The author (or editor) of a dozen books and numerous articles, Professor Turner has testified before more than a dozen Congressional committees. During 1994–1995, he held the Charles H. Stockton Chair of International Law at the Naval War College.

Professor George K. Walker is Professor of Law, Wake Forest University School of Law. He was the Charles H. Stockton Professor of International Law at the Naval War College from 1992–93. Professor Walker retired as a captain in the U.S. Naval Reserve after serving aboard destroyers, qualifying as a Surface Warfare Officer, and duty as Commanding Officer of six Reserve units. He was a Woodrow Wilson fellow at Duke University and received a Sterling Fellowship while holding a research position at Yale Law School. Professor Walker has edited or written ten books and over forty book chapters, law journals, and continuing education publications as well as several state statutes. He has served as a vice president of the North Carolina Bar Association and on the Executive Council of the American Society of International Law. Professor Walker is also a member of the American Law Institute.

Dr. Robert S. Wood is the Dean of the Naval War College's Center for Naval Warfare Studies, a focal point of strategic analysis and gaming in the naval service. He also holds the Chester W. Nimitz Chair of National Security and Foreign Affairs. Having twice served as Director of the Chief of Naval Operations' Strategic Studies group, he consults regularly with the National Security Council and the Office of the Secretary of Defense. Dean Wood has been a visiting professor and lecturer at many prominent universities in the United States and abroad, and has authored, co-authored, edited or contributed to twenty books, including *AMERICA THE VINCIBLE: U.S. FOREIGN POLICY FOR THE TWENTY-FIRST CENTURY*.

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